



**Kerich v Misik & another (Environment & Land Case 77 of 2016)
[2023] KEELC 18157 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18157 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 77 OF 2016**

MC OUNDO, J

JUNE 15, 2023

BETWEEN

SARAH C. KERICH PLAINTIFF

AND

ANNA MISIK 1ST DEFENDANT

JOSEAH KERICH 2ND DEFENDANT

JUDGMENT

1. *Vide* a Plaint dated the October 24, 2016, the Plaintiff herein sought for the following orders;
 - i. A declaration that the Defendants are trespassers on the Plaintiff's parcel of land known as Kericho/Kiptugumo/1198.
 - ii. An order compelling the Defendants herein to deliver vacant possession of the suit land or in default the Defendants and their families be evicted from land parcel Kericho/Kiptugumo/1198.
 - iii. Costs and interest.
 - iv. Any other relief the court may deem fit and just to grant.
2. The Defendants in their joint statement of defence dated the October 4, 2017 denied the allegations therein stated in the Plaint stating that her late The Plaintiff was not the proprietor of the suit land No Kericho/Kiptugumo/1198 thereby putting her to strict proof.
3. Parties having complied with the provisions of Order 11 of the Civil Procedure Rules, the matter proceeded for hearing on the October 4, 2017 wherein the Plaintiff Sarah Chepkosgei Kerich testified that she lived at Soliat within Kericho County and that she had sued Annah Misik and Joseah Kerich



who were her sister and brother in law respectively. That she was the registered owner of land parcel No Kericho/Kiptugumo /890 for which she had a title deed and a certificate of official search.

4. That the Defendants had trespassed into her land in the years 2008 and 2010 respectively wherein the 1st Defendant Annah had been cultivating on a small portion of the said land and had even constructed a structure where she carried out some business. That on the other, the 2nd Defendant lived on about ½ an acre of her land which measured 0.93 hectares. That she had written to the Defendants to vacate the land but they had refused to leave.
5. She testified that she had been given the suit land by her father in law through a court order but the Defendants had denied her the use of the same since the year 2008. She sought that they be ordered to vacate from her land and to pay for costs of the suit.
6. She went on to produce the documents in her list of documents as Pf exh 1-4.
7. On cross- examination, the Plaintiff responded that she had obtained her land through a court order. That initially, her father in law had given her one acre because her late husband did not have any land and therefore they had been allowed to cultivate on about 2 acres before he died.
8. That she had been issued with a title deed on June 6, 2016 pursuant to a court order and that the Defendants had found her on the land. That the 1st Defendant had built an iron mabati structure on her land despite the fact that her father in law had given each of his 7 sons 0.93 hectares. She confirmed that her land bordered that of the 2nd Defendant and that the posho mill was on her land. She also stated that she did not have a survey map to the land.
9. On being re-examined, the Plaintiff reiterated that according to the court order, the land had been given to her in 2009 wherein she had been issued with a title deed in June, 2016. That she had been legally entitled to the suit land in 2009 and that her father in law did not file any appeal in respect of the case between them.

The Plaintiff then closed her case.

10. The Defence case then proceeded with the evidence of Kipkemoi Sigei, who testified that he was a civil servant and a neighbor to the 1st Defendant. That he had sold about ¼ acre land to 1st Defendant's husband Philip Musik now deceased. That the land comprised in No Kericho/Kiptugumo/207 had belonged to his late "fathers" Chelilis Bor and Maina Bor wherein it had been sold in the year 1979 for Ksh 8000/= because his late father had been sick and they needed the money for treatment. That the land bordered Kipkerin's land, who was the 1st Defendant's father and the Plaintiff's father in law.
11. It was his evidence that the 1st Defendant had taken possession of the land soon after they sold it to them wherein they had started farming. That the sale agreement dated April, 1971 had been witnessed by James Sanga, Berenge, Joel Marsing and Joseph Chipchir. He testified that the Plaintiff had recently started claiming the ownership of the land. He confirmed that the Plaintiff's land bordered their land but that he did not understand the basis of her claim against the 1st Defendant since her land was separate from the one they had sold to the 1st Defendant's husband.
12. On being cross-examined, the witness stated that he worked for the Ministry of Water in Kericho. That he knew that the Plaintiff's land shared a boundary with their land. He reiterated that he knew that their family had sold land to the 1st Defendant in or about the year 1989 but that he had not been present during the transaction and that he did not have a title deed to the land as it was in his late father's name.
13. That his father had started ailing in 1988 but got worse in 1989 and that was when they had sold a portion of their land. That he had been informed that the sale agreement had been witnessed



- by James Sang, Berenge, Joel Muising and Joseph Chepchir. That he knew that the 1st Defendant had constructed a posho mill on her own land which was comprised in land parcel No Kericho/Kiptugumo/207.
14. That he did not know if the Plaintiff's land was curved out of her father in law's land but his evidence was that the land on which Anna (1st Defendant) had built had initially belonged to them wherein a portion had been sold to her father. That he was familiar with Sarah's portion of land that bordered theirs but did not know if the Plaintiff had encroached on the 1st Defendant's land. He also confirmed that they did not survey the land but that Anna and Sarah shared a boundary.
 15. At this point, Counsel had sought that the District Surveyor visits the parcel in dispute to establish whether the 1st Defendant had indeed encroached on the Plaintiff's land, wherein an order had been issued that the District Surveyor Kericho visits the parcel of land in dispute ie Land parcel No Kericho/Kiptugumo 1198 and Kericho/Kiptugumo/207 to determine whether the Defendants had encroached on the Plaintiff's land, and thereafter prepare a report.
 16. On the March 19, 2019, Mr Christopher Kirui, an Assistant District Surveyor based at Kericho testified that based on the court's order, they had visited the suit properties on February 6, 2018 in the presence of the registered owners of parcels No 890 and 207. That they had found that the mutation in respect of parcel No 890 did not tally with the Registry Index Map. That there had been a road separating the two parcels of land, however, the mutation showed that parcel No 890 had encroached on parcel No 207.
 17. The witness was stood down at the behest of Counsel so that there could be another site visit on the disputed parcels of land for everybody to get a clear picture of the alleged encroachment. The site visit was then conducted on the May 24, 2019 by the Court, Counsel and the parties herein as well as the surveyor wherein the court directed the surveyor to take measurements of the two parcels of land in order to determine whether there was any encroachment by either party and thereafter file his report.
 18. Subsequently a report dated the October 8, 2019 had been filed on the same day wherein on the December 3, 2019, by consent of both Counsel, the District Land Surveyor was directed to visit the site yet again and measure the size of land parcel No Kericho/Kiptugumo/1198 clearly indicating its boundaries and whether the two Defendants, Anna Misik and Joseah Kerich were on the land and/or doing any activities on it and thereafter file a report in court.
 19. The said report was filed on the February 17, 2020 wherein the surveyor was recalled to explain his report. On the December 14, 2021, one Mr Kibet Isaac, the Kericho County Surveyor had testified that he worked in the Ministry of Lands and Physical Planning. That the report was in relation to Kericho/Kiptugumo/1198. That there had been three issues to be determined as per the order dated December 3, 2019.
 20. One of the issues had been to measure the size of the land, clearly indicate its boundaries and indicate whether the two Defendants Anna Misik and Josiah Kerich were on the land or doing any activities on it. That they had visited the site on the February 13, 2020 where they had come with the following issues on the ground.
 21. While referring to figure No 1
 - (i) The boundary (a) and (b) did not exist on the ground.
 - (ii) There was a 6-meter road along line B C that was not indicated on the map.
 - (iii) Josiah Kerich (2nd Defendant) occupied the parcel in question being 1198.



- (iv) There was a mabati structure on the disputed area which structure was claimed by the 1st Defendant Ann Misik.
22. He proceeded to testify that the 1st Defendant claimed that she had bought the area under dispute from the neighbouring parcel being Kericho/Kiptugumo/207 in the year 1986. That she had also claimed to have been using it for about 2 years when she erected the mabati structure.
23. That they had observed that on the disputed portion, there was a posho mill, which the 1st Defendant claimed to have been using for the past two (2) years.
24. That their technical findings was that within Kericho/Kiptugumo/1198, they had determined 3 sub-portions a, b and c wherein;
- i. Portion 'a' measured 0.45 acres and was occupied by the 2nd Defendant.
 - ii. Portion 'b' measured 1.65 acres and hosted the Plaintiffs homestead.
 - iii. Portion 'c' was the disputed area which measured 0.33 acres.
 - iv. That portions (a) (b) and (c) totaled 2.133 acres and that
 - v. The registered area was 2.3 acres.
25. It was his testimony that it was evident that the ground area did not tally with the registered area. That the discrepancy between the registered area and the ground area was clear. That there was a claim that the 1st Defendant's husband bought the disputed portion from this neighbor whose portion was neighboring parcel being Kericho/Kiptugumo/207. He produced the survey report filed in court as his exhibit.
26. On being cross examined by Counsel for the Plaintiff, the surveyor responded that there were 3 issues to be determined. That they were able to demarcate the boundaries as per the map but did not erect any beacons as they were acting according to the court orders. That he was not aware that parcel No 1198 had a title deed although he confirmed that the registered area of No 1198 was 2.3 acres and was the one that was registered in their registry.
27. He also testified that he did not see the mutation form for parcel No 890. That as per the map that was attached to the report produced in court, the disputed area measuring 0.33 acres was occupied by the Plaintiff Sarah Kerich. He also confirmed that the whole parcel of land comprised Parcel No 1198 and that was why they had divided it into portions where the disputed area was portion 'c'.
28. That the boundary between (a) & (b) was J and J1 but that he could not remember whether there was a boundary between J and J1. That there was a fence between (b) and the disputed portion and Joseah Kerich was not present when they went to the site. That further he did not find out from what subdivision parcel number 1198 had come from or who had been its registered proprietor. That all portions a, b & c came from parcel No 1198 as guided by the map.
29. On cross examination by Counsel for the Defendants, the surveyor had responded that he had no idea from which parcel of land parcel No 1198 had emanated from and that he did not place any beacons on the surrounding parcels of land.
30. He was referred to the diagram on his report wherein he stated that parcel No 1198 was boarded by 2 major roads on 3 sides of access which were visible on the ground except lines 'b' 'a' 'h' and 'g' which were on the lower end, and 'c' 'd' 'e' on the upper end. That they had used the map to demarcate those points. He reiterated that the area on the ground did not tally with the registered area.



31. The 1st Defendant Anna Misik then took the stand where she testified that she lived in Kasegut on parcel of land No 207 and was a farmer. That she knew Sarah Chepkosgei, the Plaintiff who was her sister in law as she had been married to her brother and that she lived in Soko Uhuru along Kericho Kisumu Highway.
32. Her evidence was that Land parcel No 207 belonged to Kiberenge and from whom her deceased husband had bought a portion about 20 years ago. That she normally cultivated on the land and had also constructed a posho mill there. That the Plaintiff had lay claim of ownership to the portion of land where the posho mill had stood for almost 10 years and which portion measured almost one point. That she lived on her separate land from the suit land for which she had been utilizing for almost 10 years.
33. On being cross-examined, she had confirmed that the posho mill was on land parcel No 207 which had not been subdivided by the people who had sold it to them. That she was not aware that the Plaintiff had title to parcel No 1198 and neither was she aware that the posho mill was on that parcel No 1198.
34. That her husband had bought the piece of land a long time ago from its owner who was now deceased. That she had not asked for the title deed because it was known that they purchased the land. She confirmed that Parcel No 890 belonged to their neighbor. She also testified that she was a daughter to Matayo Arap Chirchir.
35. That parcel No 890 was her father's land and it bordered parcel No 207. That the piece of land where the posho mill stood was adjacent to parcel No 890. That she may not be aware that the parcel of land she occupied was in parcel No 890 because the land was unsurveyed. She also confirmed that she did not have a title to parcel of land No 207.
36. She reiterated that the Plaintiff was her sister in law who got married to her brother called Joel Kerich who was not a son to the proprietor of parcel No 207 but the son to the proprietor of parcel of land No 890. That she had been present when the court and surveyor had visited the suit land but did not know what the surveyor had written and was not aware that the portion they had bought was part of parcel No 1198.
37. During re-examination, the witness confirmed that parcel No 207 was separate from parcel No 890 which belonged to her father.
38. The third defence witness Vincent Kipngetch Kerich testified that he lived in Kasegut and was a machine operator with a Chinese company. That he knew the Plaintiff who was his sister in law as she was married to his brother Joel Kipchumba Kerich's now deceased, having died about 5 years ago.
39. He produced the Notice of the death and funeral announcement as Df exhibit 1 before he proceeded to testify that Sarah lived on his father's land to which he had title deed dated July 22, 1992 and which he produced as Df exh 2.
40. He testified that the dispute between him and the Plaintiff was that after his father sub divided the land into 2 acres for him and Joel so that they could cultivate and live there, Joel had lived on his portion with the Plaintiff and after Joel died, the Plaintiff started claiming that the land was small wherein she had wanted to demolish his houses and extend her land. That the land had just been given to them about 10 years ago just to use and that they had been using the same with his father's permission.
41. That the land was still registered to his father although he was aware that the Plaintiff had brought a title to court which he did not know how she got it because 'the land had belonged to his brother. That although the Plaintiff had served them with a "letter" issued by the court stating that they were on her land, yet he had the title deed to the said land.



42. He confirmed that his father was still alive and that the land had not been given to her as it was their home land/family land. That nobody had been given a title deed as their father had just asked them to utilize the land.
43. During cross-examination, the witness testified that the original title had been left at home. He then confirmed although that there had been a land dispute between them and the Plaintiff, yet his father had the title deed. He was adamant land parcel No 890 had not been sub divided and he did not know where the Plaintiff got her title from.
44. He also confirmed that at the time when the surveyor had visited the site and measured the land (ref to report dated February 14, 2020) he was not there. That were there to have been a subdivision of land, the family would have sat down for deliberations. This did not happen. That although there had been a dispute before the tribunal, he did not follow up on the award of the tribunal and therefore did not know where/how the Plaintiff had got her title deed.
45. When he was referred to Pf Exh 4, he confirmed that he had seen the order but his problem was that his father still had the title deed. That the title deed which the Plaintiff had was in relation to the portion of land that she and Joel used to cultivate.
46. On being re-examined, the witness stated that he was not party to the tribunal dispute which was between the Plaintiff and his father and which had taken place after the death of his brother. He reiterated that his father was still alive and that he did not know how the Plaintiff got the title to the land she still lives on to date.
47. David Kiplangat Chumo testifies ad DW4 to the effect that he was a farmer and a neighbor to the Plaintiff. That he also knew Annah and Joseah Kerich. That Joseah was the Plaintiff's sister in law. That Anna's husband Phillip Misik, now deceased, had bought land from Bor about 20 years ago. That he knew the boundary to Sarah's land.
48. He was categorical that the land was Annah's because her husband had bought it wherein she had been living for 20 years and had tilled the same for about 10 years. That all this time, he knew the land belonged to Phillip Misik who was a son in law to Sarah. That Sarah's land was Joel's fathers land.
49. In cross examination, he stated that Phillip had bought land parcel No207 and had a sale agreement. That later Sarah's husband had planted trees on his boundary. He also confirmed that he was not there when the surveyor visited the land, and did not know whether it existed.
50. His evidence was that Sarah's father in law gave them the land to till (wakulie) but he had not sub divided it. That parcel No 207 bordered Sarah's land and it was a small land. That he did not know if Sarah had a title deed or not.
51. He also confirmed that the elders had sat to solve a dispute between Sarah and Annah and that whereas Sarah lived on her land, Annah's land was different.
52. In re- examination, he stated that there were trees planted by Sarah's husband because he did not want the land to be sold. That there was a posho mill that was outside Sarah's land.
53. The defence closed its case and parties were directed to file and exchange their written submissions.

Plaintiff's Written Submissions.

54. The Plaintiff's submission was that the court had jurisdiction to hear and determine the suit pursuant to the provisions of Article 162(b) of the *Constitution* and Section 101 of the *Land Registration Act*.



55. That from the pleadings and the testimony of the parties herein, it was evident that the suit involved title to land and thus the sanctity of the title ought to be protected unless there was an element of fraud attributed to the acquisition of the title deed in question as is stipulated under Section 23, 24, 25 and 26 of the *Land Registration Act*. That from the exhibits produced by the Plaintiff, it had been clear that she, through legal processes had been awarded a portion of the 2nd Defendant's parcel of land by the court and which decision was never reviewed or appealed against. That thereafter the Plaintiff had proceeded to obtain a title deed which has not been cancelled.
56. That the 2nd Defendant, who was the owner of the parcel of land never testified in court to negate the Plaintiff's testimony and it was therefore not in doubt that the Plaintiff was the registered owner of the said parcel of land. That at no particular point in their pleadings had the Defendants raised any element or particulars of fraud to negate the Plaintiff's title deed. There was also no evidence of fraud adduced to prove that the Plaintiff's title deed was not properly obtained. In essence therefore, the Plaintiff had proved his case on a balance of probability and judgment should be awarded in her favour.
57. The Plaintiff then proceeded to rely on the provisions of Sections 107 and 108 of the *Evidence Act* to submit that whoever alleges must prove and that to this effect, the Plaintiff had proved her case both through oral and documentary evidence.
58. That the surveyor's report had summarized the entire case and provided the picture which the court needed to be painted in its mind wherein it had revealed who the owners of the suit land on the ground were, the Plaintiff being one of them. That the reflection on the ground was in particular what was in the register at the lands office. That the sanctity of a title was critical in all manner unless fraud was pleaded and proven. Reliance was placed on the decision in the case of *Samwel Ambasa & 3 Others v Stella Ingasia* [2022] eKLR to submit that since the Plaintiff had proved her case on a balance of probability, judgment ought to be delivered in her favour together with costs.

Defendants' Submission

59. After summarizing the evidence as adduced in court, the Defendants framed their issues for determination as follows;
- i. Whether the Plaintiff is the duly registered owner of the suit property.
 - ii. Whether the Defendants had encroached and/or trespassed into the said property.
60. On the first issue for determination, the Defendants submitted that the Plaintiff had provided a title deed which had been hived from the original Kericho/Kiptugumo/890 but it was not clear as to how she had had the said suit land registered to her name yet her deceased husband had not been registered to the same. That she could only have acquired the land after the demise of her father in law as a beneficiary.
61. The Defendants further relied on the provisions of Section 3(1) of the *Trespass Act* to submit that trespass was an intrusion by a person into the land of another who was in occupation. That the Plaintiff had not clearly demonstrated how both Annah Misik and Joseah Kerich had illegally intruded into the said property. The only issue arising therein was on a boundary shared or used.
62. That the 2nd Defendant had neither entered nor planted, or cultivated or used any part of the said property which fact had been supported by the land survey report which had found that there had been no wall or fence on the disputed area. That the disputed area marked in "Black" on the sketch map was nowhere near where Joseah Kerich resided as indicated in the map "A".



63. That the report had further stated that there was a disparity in the acreage of the land on the ground as compared to the registered area. From the court proceedings in situ, it had been noted that there was no single dwelling house on the said land which finding had been supported by the surveyor's report which had found that there has been only a disused "mabati" structure on the property. The report did not capture any encroachment by any of the Defendants.
64. That the onus was on the Plaintiff to prove that she was the owner of the suit properly and that the Defendants had invaded and occupied the same without any justifiable cause which onus she had not proved beyond a balance of probability and hence her suit ought to be dismissed with costs.

Determination.

65. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law herein. I have also considered the Plaintiff's case in which she seeks declaration that the Defendants are trespassers on her parcel of land known as Kericho/Kiptugumo/1198 and therefore they should deliver vacant possession of the said land or in default they and their families be evicted from therein.
66. In their defence and although the 2nd Defendants stayed away from the proceedings and did not testify, it had stated that the Plaintiff was not the proprietor of the suit land No Kericho/Kiptugumo/1198.
67. The issues that stand out for determination herein are;
 - i. Whether the Defendants herein are trespassers on land reference No Kericho/Kiptugumo/1198.
 - ii. Whether or not the Defendants should be evicted from land reference No Kericho/Kiptugumo/1198.
 - iii. Whether the Plaintiff has made out her case.
68. During the hearing, the Plaintiffs case was that she was the registered owner of land parcel No Kericho/Kiptugumo /890 for which she had a title deed and that the Defendants, who were her sister and brother in law respectively, had trespassed into her land in the years 2008 and 2010 respectively, land which she had been given by her father in law through a court order but which land, the Defendants had denied her to use since the year 2008. That wherein the 1st Defendant, Annah had been cultivating on a small portion of the said land and had even constructed a structure where she carried out some business, the 2nd Defendant lived on about ½ an acre of her land which measured 0.93 hectares.
69. The Plaintiff had proceeded to produce as Pf exh 1, a title deed to land parcel No 1198 measuring 0.93 hectares, land which had been registered to her on the 6th June 2016, as well as a certificate of official search confirming the same.
70. She also produced as Pf exh 3, an order of the court dated the 30th March 2009 issued in the Kericho PMC Misc Civil Application No 45 of 2008 where the executive officer of the court had been directed to sign the mutation and transfer forms in favour of the Plaintiff/Applicant in respect to land LR No Kericho Kiptugumo/890 measuring 7.38 hectares.
71. The 1st Defendant's case on the other hand had been that about 20 years ago, her husband Philip Musik now deceased had bought land from Kiberenge the proprietor of parcel No 207, land which she had been cultivating on and had also constructed a posho mill therein. Her evidence was that the posho mill was on land parcel No 207 land which had not been subdivided by the people who had sold it to them. That she was not aware that the Plaintiff had title to parcel No 1198 and neither was she



aware that the posho mill was on that parcel No 1198. That parcel No 890 was her father's land and it bordered parcel No 207. Her evidence had been supported by the evidence of DW4 and DW1's who had confirmed that indeed around the year 1979, they had sold ¼ acre of land which was comprised in No Kericho/Kiptugumo/207, to the 1st Defendant's husband for Ksh 8000/=

72. DW 3 also confirmed that that parcel No 890 was his father's land. That his father was still alive and had given him and his deceased brother a portion of land on parcel No 890 to cultivate but after the death of his brother Joel, the Plaintiff who was his brother's wife had started to lay claim on the portion of land that his father had given to his late brother to cultivate, stating that it was small and had wanted to demolish his houses and extend her land. That in as far as he was concerned title to No 890 had not been subdivided and was still in his father's name and therefore he did not know how the Plaintiff had been issued with title to parcel No 1198.
73. It is on record that to understand the matter better there had been a court visit insitu but unfortunately the court did not record its finding. However from the report of the land surveyor dated the February 14, 2020 and filed on February 17, 2020 on the situation on the ground in relation to land parcel No Kericho/Kiptugumo/1198 and whether the two Defendants, Anna Misik and Joseah Kerich were on the land and/or doing any activities on it, it had come out clearly in the technical findings that the sub portions marked as 'a' in which the 2nd Defendant lay claim to, portion 'b' which contained the Plaintiff's homestead and 'c' which was the disputed area, were all within land parcel No Kericho/Kiptugumo/1198.
74. The provision of Section 24(a) of the Land Registration Act No 3 of 2012 outlines the interests and rights of a registered proprietor of land as follows;
- '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.....'
75. Section 25(1) of the Land Registration Act also stipulates that ;
- '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...'
76. The law is very clear on the position of a holder of a title deed in respect of land. Indeed Section 26(1) of the Land Registration Act provides as follows:
- "the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts 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 the 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
 - b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme



77. It will be seen from the above, that title to land is protected, but the protection can be removed and title impeached, if it is 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.
78. There was no evidence adduced to the effect that the Plaintiff acquired the suit land through fraud or misrepresentation or that her certificates of title had been acquired illegally, un-procedurally or through a corrupt scheme. The Defendants failed to adduce evidence that the original land being Kericho/Kiptugumo/890 had not been subdivided irrespective of the evidence adduced that its proprietor was still alive. Indeed what came out clearly from Pf exh 3 was that the suit land herein had been excised from the mother title No Kericho/Kiptugumo/890 through a court order which had not been challenged and/or appealed from.
79. Indeed based on the evidence adduced herein above, and while relying on Section 26(1) of the Land Registration Act, we cannot run away from the fact that the Plaintiff has indeed satisfied the legal provision that she is the proprietor of the suit land No Kericho/Kiptugumo/1198 and hence has absolute ownership including all rights and privileges appurtenant to it.
80. Having established this fact and the fact that from the surveyor's report it had been clear that the portions of land claimed by the Defendants were all within land parcel No. Kericho/Kiptugumo/1198, and further that there was a road demarcating parcels of land then it goes without saying that they were trespassers on the said parcel of land.
81. Trespass has been defined by the 10th Edition of Black's Law Dictionary as;
- “an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”
82. Section 3 (1) of the Trespass Act, also defines trespass as follows;
- “Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
83. The Court in John Kiragu Kimani vs Rural Electrification Authority [2018] eKLR also in defining trespass relied on Clark & Lindsell on Torts, 18th Edition on page 923 which defines trespass as;
- ‘any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason’.
84. I find that the Plaintiff is indeed entitled to protection by the law from the Defendants who interfered with her rights and privileges over the suit land. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of Park Towers Ltd v John Mithamo Njika & 7 others [2014] eKLR where JM Mutungi J., stated:-
- ‘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...’



85. In *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR the court held as follows:

“The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See *Hostler v Green Park Development Co* 986 S W 2d 500 (No App 1999).

86. The summation of my finding is that having found that the Plaintiff had proved her case against the Defendants to the effect that they had trespassed on the suit property without any legal claim or title and although it is trite law that an act of trespass is actionable per se by an award of general damages once it is established, yet the Plaintiff has not sought for damages in the present circumstance and therefore the same shall not be awarded. I thus enter judgment in the Plaintiffs favor as follows;

i. A declaration is hereby issued that the Defendants are trespassers on the Plaintiff’s parcel of land known as Kericho/Kiptugumo/1198.

ii. The Defendants shall herein deliver vacant possession of the suit land within 30 days upon delivery of this judgment or in default they and their families be evicted from land parcel Kericho/Kiptugumo/1198.

iii. Costs of this suit with interest at court rates.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 15TH DAY OF JUNE 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

