



**Makau v Kakua & 8 others (Environment & Land Case 104 of 2021)  
[2023] KEELC 19238 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19238 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 104 OF 2021  
A NYUKURI, J  
JULY 26, 2023**

**BETWEEN**

**PATRICK MASAI MAKAU ..... PLAINTIFF**

**AND**

**MARY MBITHE KAKUA ..... 1<sup>ST</sup> DEFENDANT**

**MBITHI MUIA YAVU ..... 2<sup>ND</sup> DEFENDANT**

**MUNYAO MUIA ..... 3<sup>RD</sup> DEFENDANT**

**NICHOLAS NGUNGU ..... 4<sup>TH</sup> DEFENDANT**

**MUASYA KISANGI ..... 5<sup>TH</sup> DEFENDANT**

**JOSEPH YAVU MWIKYA ..... 6<sup>TH</sup> DEFENDANT**

**MUIA MBITHI YAVU ..... 7<sup>TH</sup> DEFENDANT**

**JOHN MAKAU ..... 8<sup>TH</sup> DEFENDANT**

**JAMES MUIA KAMUNZYU ..... 9<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. Vide a Plaint dated December 15, 2021, the plaintiff sought the following reliefs against the defendants severally and jointly: -
  - a. A declaration that land No. Ndithini/Mananja Block 6/139 as registered is the absolute property of the plaintiff and that the defendants do not own any portion thereof.



- b. A permanent injunction do issue to restrain the defendants whether by themselves, their servants, their families, relatives and/or agents or anyone claiming under them otherwise however from entering or using the said land parcel Ndithini/Mananja Block 6/139.
  - c. Damages or profits at a rate of Kshs. 150,000/- per year since year 2014 on particulars of loss and damages or as this honourable court may deem just until vacant possession is delivered up.
  - d. An order for vacant possession or in the alternative an eviction order of the defendants or anyone claiming under the defendants by a court auctioneer with assistance from the OCS Kangundo or Matungulu Police Stations at the expense of the defendants in terms of costs spend in eviction which costs to also be added in the certificate of costs.
  - e. Costs of this suit and interests.
2. The plaintiff alleged that he was the registered owner of parcel of land known as Ndithini/Mananja Block 6/139 measuring approximately 42.78 Ha. (hereinafter referred to as the suit property) and that in 2014 the defendants trespassed on the suit property, put up structures thereon, began farming on it and occupying it. That despite being asked to vacate the defendants have been adamant, thereby depriving the plaintiff the use of his land. The plaintiff alleged that he had suffered loss and damage for loss of user at Kshs. 150, 000/= per a year and his fence being removed by thE defendants.
  3. From the record it is evident that the defendants were served on February 28, 2022, but failed to enter appearance, file defence or participate in these proceedings. The matter proceeded by way of formal proof.

#### **Plaintiff's Evidence**

4. The plaintiff, Patrick Masai Makau, testified as PW1 on February 19, 2023. He adopted the contents of his witness statement dated December 15, 2021 as his evidence in chief. It was his testimony that he is the legal and bona fide owner of the land number Ndithini/Mananja Block 6/139 with documents relating back to 1971 till issuance of a title deed in 2019. He averred that he used it for cultivation and keeping livestock. He further stated that the defendants had on several occasions since 2014 trespassed onto his land and started using the same illegally. Further, that they had built structures and started farming on it and occupied it. He stated that he had visited the land to warn and caution the defendants over the illegal acts in vain. He also stated that he had fenced the land severally but the defendants had been destroying and removing his posts and barbed wire fence, claiming ownership yet they have no documents to prove the same. He also averred that a surveyor had confirmed by demarcation as appears on the map from the Lands offices, that the land is his and that the defendants were trespassers.
5. The plaintiff further stated that as a result of the illegal trespassers, he has been deprived peaceful use, benefit, enjoyment and quiet possession of his land acquired through membership from the original society. He also stated that he used to farm and benefit from the trees from the suit land but the defendants had also frustrated his efforts as he did not live on the land despite owning it and that his continuous use is always frustrated by the defendants. He stated that since the defendants were on the ground, they kept destroying his trees, fence and posts and he suffered losses of about Kshs. 150,000/- per year since the year 2014. It was his testimony that he had reported the matter to the chief and that the defendants had been addressed by the chief but they failed to comply. He therefore prays that this honourable court grants his prayers as per his plaint. The plaintiff produced five documents in support of his case; namely, demand letters; Title Deed for the suit land; Photographs of the suit land; and society membership receipts.



6. PW2 was Musyoka Wambua, a resident of Muthesya location, Ndithini Division, Masinga Sub County, Machakos County. He stated that he was the chief of that area from 1995 to 2018. He stated that he knew the plaintiff from 1982 and he was also familiar with the Plaintiff's parcel of land, Ndithini/Mananja Block 6/139. He also stated further that he watched over the plaintiff's land as the plaintiff lived in Machakos but that he used to graze and cut grass on the suit property. He also stated that there were squatters who were on and off the suit property and who were evicted by Matungulu Farmers Society Company and each person in that area got his rightful share. He averred that a survey was done and a proper subdivision followed after the eviction of the squatters and each member was given his right parcel of land.
7. The witness further testified that beacons were put in place and he could therefore identify the plaintiff's parcel of land. He also averred that he knew the defendants, having been area chief of Muthesya location where they all reside. He stated that the defendants had trespassed onto the plaintiff's parcel of land Ndithini/Mananja Block 6/139 on diverse dates since the year 2014 and started using it illegally, built structures and started farming and occupied it. It was his testimony that he had then informed the plaintiff of the same and at the plaintiff's instance, he summoned the defendants for a meeting at his office where they discussed the issue. That the defendants admitted that they had been conned off the land by some people who were claiming to be the owners but they never got any documents of title. Further, that the defendants even agreed to relocate and move out but had since refused to move out.
8. He further stated that the plaintiff had severally visited, fenced and used the suit land, but the defendants had been destroying and removing the posts and barbed wire fence claiming ownership yet they had no documents to prove the same. He also stated that a surveyor had determined that the defendants were trespassers ab-initio and that the plaintiff had been deprived use, benefit, enjoyment and quiet possession of his land which he acquired through membership from the original society. He thus prayed that the defendants be evicted from the plaintiff's land.
9. PW3 was Andrew Wambua, a sub county surveyor in Machakos, Mwala and Kathiani. He testified that he was involved in the survey process of the suit property which he did together with Samuel Gichuhi who was the lead surveyor. It was his testimony that Mr.Gichuhi had undergone a heart surgery and could not attend court. He stated that the survey was for beacon re-establishment on the suit property and was conducted on December 10, 2014. He further stated that his findings were that the total acreage was 42.78 Ha and that there was an encroachment of 15.21 Ha on the suit property, by owners of parcel number 140. He produced a copy of the surveyor's report conducted in 2014. With the above evidence, the plaintiff closed his case. There being no witness from the side of the defendants, the court directed the Plaintiff to file submissions in support of their case. The plaintiff filed his submissions on April 27, 2023.

### **Plaintiff's Submissions**

10. Counsel for the plaintiff laid down three issues for determination by the court, namely, whether the plaintiff is the registered owner of the suit property; whether the defendants were trespassers on the suit property and whether the plaintiff is entitled to damages. On whether the plaintiff was the absolute registered owner of the suit property, they placed reliance on provisions of section 26(1) of the [Land Registration Act](#) which stipulates that the certificate of title shall be *prima facie* evidence of ownership by the person named as proprietor thereon. To buttress this point, Counsel further cited the case of [Kelyia Group Ranch v Samwel Oruta & 9 others](#) [2021] eKLR where the court upheld the ownership of the suit land in favour of the plaintiff whose name was on the title document. Therefore, counsel



argued that the Plaintiff in the instant suit had produced the title document in his name and outlined the history of the land from the group up to his registration as the owner.

11. On the question of trespass by the defendants, counsel cited section 3 of the *Trespass Act* of 1962 wherein trespass upon land is defined. Counsel argued that the burden of proving otherwise rested on the person accused of trespass. Counsel further relied on the cases of *Alex Waigera Mwaura v Chania Power Company Limited & another* [2020] eKLR and *Rboda S. Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR for the proposition that trespass is an intrusion on another person's property. It was their contention that the plaintiff has never allowed the defendants to enter the suit property and that their actions amount to trespass. They also relied on the report by the surveyors who confirmed the trespass.
12. On the issue as to whether the plaintiff was entitled to damages, counsel argued that the plaintiff had lost out on agricultural activities that he would have been conducting on his land if the encroachment by the defendants had not occurred. He cited the case of *Attorney General v Halal Meat Product Limited* [2016] eKLR for the proposition that where a person is unlawfully deprived of the use of their land, they are entitled to damages known as mesne profits.

### **Analysis and Determination**

13. I have considered the pleadings, the evidence and submissions filed by the plaintiff. The issues that arise for determination are;
  - a. Whether the plaintiff has proved ownership of the suit property;
  - b. whether the defendants have trespassed on the suit property; and
  - c. Whether the Plaintiff is entitled to orders sought.
14. Article 40 of *the constitution* of Kenya protects the right to property acquisition and ownership as long as the property was lawfully acquired. Section 26 of the *Land Registration Act* No. 3 of the Laws of Kenya provides that a certificate of title shall be held as conclusive evidence of proprietorship unless it is proved that the title was acquired by fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme.
15. In the instant suit, the Plaintiff's case was that he acquired the suit property from Matungulu Farmers Company Limited in 1971 and that several processes were undertaken including subdivision and beacon establishment, culminating in issuance of title in 2019. I have considered the documents produced by the Plaintiff and among them are three receipts from Matungulu Farmers Company Limited dated August 30, 1971, and April 7, 1984; and a title deed showing that the plaintiff was registered as proprietor of the suit property on May 15, 2019. As the plaintiff has not only proved ownership by registration but demonstrated that he lawfully acquired the suit property by his membership of Matungulu Farmers Company Limited, and there being no evidence from the defendant challenging the plaintiff's evidence, I am satisfied that indeed the Plaintiff is the bona fide owner of the suit property, deserving of protection of the law.
16. On the question of trespass, the plaintiff testified that the defendants had trespassed on his property by 15. 21 Ha. According to the surveyor's report produced as P-Exhibit 6, the owners of parcel number 140 had trespassed on the plaintiff's land by the stated acreage. Again, this evidence was not controverted by the Defendants who failed to file defence.
17. The *Black's law Dictionary* 11<sup>th</sup> Edition defines "Trespass" as unlawful entry on another's land. The plaintiff testified that he did not permit the defendants to enter his parcel of land. Therefore, having



found that the plaintiff is the bona fide owner of the suit property, and as no consent was obtained by the defendants to enter the plaintiff's land, I find that their entry was unlawful, and the same amounts to trespass.

18. On the question of the orders sought, I note that the plaintiff sought for a declaration that he was the absolute owner of the suit property, a permanent injunction, vacant possession and damages or profits in the sum of Kshs. 150,000/= per year from 2014.
19. Sections 24 and 25 of the *Land Registration Act* No. 3 of 2012 provides for interest conferred by registration and the rights of a proprietor, to the effect that registration of a person as owner of land vests in that person absolute ownership as well as all the rights and privileges appurtenant thereto to the exclusion of the entire world. Therefore, by law, without permission, a person is not permitted to interfere with another's enjoyment of their land rights. However in this matter, it is clear that the Defendants have interfered with the Plaintiff's enjoyment of the rights appurtenant to his registration and ownership of the suit property. In the premises, the Plaintiff is entitled to an order of permanent injunction together with orders of vacant possession, as sought in the plaint to enable him enjoy rights conferred on him by both *the Constitution* and statute.
20. On the question of mesne profits, section 2 of the *Civil Procedure Act* defines mesne profits as follows;

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession
21. Order 21 Rule 13 of the *Civil Procedure Rules* provides as follows;
  13.
    - (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—
      - (a) for the possession of the property;
      - (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
      - (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
        - (i) the delivery of possession to the decree-holder;
        - (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or
        - (iii) the expiration of three years from the date of the decree, whichever event first occurs.



- (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

22. The Court of Appeal in the case of *Attorney General v Halal Meat Products Limited* [2016] eKLR considered when mesne profits could be awarded. The court stated as follows;

It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18<sup>th</sup> Ed. para 34-42.

23. In the instant suit the plaintiff has sought for mesne profits in the sum of Kshs. 150,000/= per year since 2014 in respect of the defendants' encroachment in regard to land measuring 15.21 Ha. Having considered the acreage involved of 15.21 Ha and the fact that the land was being used for agricultural purposes, I am satisfied that a sum of Kshs. 150,000/= per year as mesne profits is reasonable in the circumstances of this case.

24. The upshot is that I find and hold that the plaintiff has proved his case on the required standard and therefore I enter judgment for the plaintiff against the defendants jointly and severally as follows;

- a. A declaration be and is hereby made that land No. Ndithini/Mananja Block 6/139 as registered is the absolute property of the plaintiff and that the defendants do not own any portion thereof.
- b. A permanent injunction be and is hereby issued restraining the defendants whether by themselves, their servants, their families, relatives and/or agents or anyone claiming under them otherwise however from entering or using the said land parcel Ndithini/Mananja Block 6/139.
- c. Mesne profits at a rate of KS. 150,000/- per year is awarded to the plaintiff since year 2014 until vacant possession is delivered.
- d. The defendants are hereby ordered to give the plaintiff vacant possession in respect of land parcel Ndithini/Mananja Block 6/139 within 60 days of this judgment, in default, the defendants to be evicted at their own costs by a court auctioneer with assistance from the OCS Matungulu Police Station.
- e. Costs of this suit are hereby awarded to the plaintiff.

25. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 26<sup>TH</sup> DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**A. NYUKURI**

**JUDGE**

