



REPUBLIC OF KENYA



KENYA LAW
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**Ndungu v Mwangi (Environment & Land Case E026 of 2022)
[2025] KEELC 299 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E026 OF 2022
LN GACHERU, J
JANUARY 29, 2025**

BETWEEN

MILKAH KANENE NDUNGU PLAINTIFF

AND

PETER MWAURA MWANGI DEFENDANT

JUDGMENT

1. Vide a Complaint dated 10th November 2022, the Plaintiff is seeking for Judgment to be entered against the Defendant as follows:
 - a. An order of permanent injunction restraining the defendant by himself, his agents, servant, employees and/or persons claiming authority of the Defendant from trespassing, interfering with picking of tea leaves, cultivating and/or in any way making use of land parcel Non. LOC.16/Kigoro/712.
 - b. General damages for trespass.
 - c. Cost for the suit.”
2. It is the Plaintiff’s claim that the Defendant and his agents have no color of law to enter into the suit property and/or to pick tea leaves therefrom. That in August 2022, she was made aware that trespassers had entered into the suit property whereupon, she put out a notice to the public that trespassers would not be allowed on land parcel number LOC.16/Kigoro/712.
3. . The Plaintiff, averred that she is not privy to the lease agreement between her deceased son and the Defendant, and that she only developed an interest in tea-picking after the death her son Newton Mukunya Ndung’u.
4. The Plaintiff further averred that the reason she declined to honour the summons to appear before the Assistant County – Commissioner – Kigoro Sub-County issued in October 2022 to discuss with



the Defendant herein issues related to entry into and use of the suit land, is because she felt that the Defendant lacked any legal authority to enter into the suit land and pick tea leaves therefrom.

5. . The Plaintiff filed in Court a Certificate of Official Search dated 28th October 2022, which shows that the suit land LOC.16/Kigoro/712 is registered in her name.

The Defendant's Response

6. The suit is opposed by the Defendant via a Defence filed on 26 January 2024, wherein he averred that he is legally picking tea from LOC.16/Kigoro/712, by virtue of a lease agreement dated 8th March 2021, between himself and the Plaintiff's son Newton Mukunya (deceased) whose term runs from 1st April 2021 to 31st April 2028.
7. . The Defendant averred that the Plaintiff's two sons have been residents on the suit land, having been sired by the Plaintiff prior to her marriage. Defendant averred that one of the Plaintiff's sons Newton Mukunya Ndung'u (deceased), planted tea bushes thereon since year 2001 which are the subject of the lease agreement with the defendant dated 8th March 2021.
8. That as per the terms of the sale agreement with the Plaintiff's son Newton Mukunya Ndung'u (deceased), the Defendant agreed to assist the deceased to repay a loan Ksh. 738,000/= owed to Unaitas Sacco Society, that was in default, and in exchange the deceased covenanted to allow the Defendant to pick tea leaves from the suit land from April 2021 until 31st April 2028.
9. That the lease agreement with the deceased was ratified and witnessed by two members of the relevant tea buying center, and three officials thereof as is the trade custom or usage in such contracts.
10. That the Plaintiff does not reside on the suit land which she inherited from her father to hold in trust for herself and her two sons (including Newton Mukunya Ndung'u), born prior to the Plaintiff's marriage. It was averred that the Plaintiff resides on a different property following her marriage, and she is aware of the lease agreement involving her deceased son and the Defendant, but is seeking to enrich herself unfairly by disavowing the said agreement.
11. That in exchange for servicing the loan which the Plaintiff's son Newton Mukunya Ndung'u owed Unaitas Sacco Society, Newton Mukunya Ndung'u transferred his KTDA Growers Certificate to the Defendant so that he could pick tea from the suit property uninterrupted.
12. The Defendant further averred that Newton Mukunya Ndung'u who died in or about September 2022, had resided on the suit land together with his family for 22 years; and that following the death of Newton Mukunya Ndung'u, the Plaintiff's other sons started harassing the Defendant by denying him access to the suit property.
13. That the Plaintiff has proved not amenable to settling the matter through alternative disputes resolution mechanisms (ADR), as the efforts by the Assistant County Commissioner to intervene in the matter were rejected by the Plaintiff.
14. The Defendant urged the court to dismiss the Plaintiff's suit with costs, and for a permanent injunction barring the Plaintiff from interfering with tea-picking by the Defendant on the suit land for the remainder of the lease term, until 31st April 2028.
15. The suit proceeded by way of viva voce evidence.



The Plaintiff's Case

16. PW1 Milkah Kanene Ndung'u, testified and adopted her Witness Statement as her evidence in chief. She relied on and produced her list of documents as her exhibits, which were marked as P. Exhibits.
17. On cross-examination by Mr. Wainaina for the Defendant, PW1 testified that she is the mother of two sons, and she sub-divided the suit land into four (4) portions. That she allocated half of the suit property to her son Robert. That she was not aware that her other son Newton was married with children, and that he had leased the property to the Defendant.
18. Further, that the Defendant is a trespasser onto the suit property as the land belongs to PW1 and not to Newton who lacked capacity to lease out the said land. She stated that she purchased the suit land in a year which she could not remember, hence the said land is not ancestral land.
19. On re-examination, she stated that her son Newton Mukunya was unmarried, and also denied visiting the Lands Office to change the title deed in respect of the suit property or transferring her tea shares at the local factory.

The Defendant's Case

20. DW1 Peter Mwaura Mwangi, adopted his Witness Statement as his evidence in chief and produced his List of Documents as exhibits marked D exhibit I and II. It was his testimony that Newton Mukunya had taken out a loan with Unaitas, which loan he subsequently defaulted. That Newton Mukunya sought out the Defendant whereupon they executed a lease agreement for a term of 6 years wherein, Newton transferred his tea bushes to the Defendant. Thereafter, Newton died and the Plaintiff brought the instant suit against the Defendant.
21. On cross-examination by Mr. Mbugua for the Plaintiff, DW1 testified that the Plaintiff is known to him being the mother of Newton Mukunya who was his schoolmate. He stated that the both Plaintiff and the Agricultural Officer were aware of the transfer of tea bushes by Newton to the Defendant.
22. That he was issued with a letter from the tea factory bearing a transfer number and attesting to the transfer of Newton's tea bushes in his favor, which is on record. He admitted that the suit property was never transferred from the Plaintiff to Newton Mukunya. Further, that the Chief of Kigoro Location prevented him from harvesting tea from the suit land.
23. He relied on the agreement executed with said Newton Mukunya, being his exhibit 1. He affirmed that Newton did not possess title to the suit property.
24. On re-examination, DW1 stated that the suit land was sub-divided prior to the execution of an agreement between Newton Mukunya and himself. Further, that Newton transferred his tea grower number to DW1 upon execution of the aforesaid agreement.
25. DW2 MArgaret Wanjiru Mukunya, testified and adopted her Witness Statement as her evidence in chief and described the Plaintiff as her mother-in-law. That her husband died and was buried on the suit land. Further, that she established her matrimonial home together with her husband on the suit property which was allocated to them by the Plaintiff and measures approximately 3 Acres.
26. That Robert, another son of the Plaintiff, was also allocated 3 Acres of land by the Plaintiff, in which he currently resides. It was her testimony that she was married to Newton Mukunya for 24 years until his demise. That the Plaintiff sued DW2 before the Kandara Law Courts. Further, DW2 was not shown anywhere to live by the Plaintiff. She testified that her husband leased the suit property to the Defendant herein.



27. On cross-examination by Mr. Mbugua for the Plaintiff, DW2 testified that she does not possess a Marriage certificate attesting to her marriage with Newton Mukunya. However, their union produced three children namely: 1. Daniel Maina Mukunya; 2. Phylis Wambui Mukunya; And, 3. Mourine Wanjiku Mukunya. She reiterated that the Plaintiff is her mother-in-law while her father-in-law was known as Isack Ndung'u.
28. She further testified that Newton Mukunya had four sisters and three brothers, and they all live on other sections of the suit property. She admitted to not having seen any lease agreement executed as between the Plaintiff and the Defendant herein. Further, that she is not conversant with the signature of her late husband, and her daughter Mourine Wanjiku Mukunya is named after the Plaintiff.
29. On re-examination. DW2 testified that she is the Administrator of the estate of Newton Mukunya Ndung'u, and nobody has challenged the same.
30. After the close of viva voce evidence, the parties were directed to file and exchange written submissions, which they complied.

The Plaintiff's Submissions

31. The Plaintiff filed her written submissions dated 7th November, 2024 through Mbiyu Kamau & Co Advocates, and identified eight (8) issues for resolution as follows:-
 - (a) Who is the rightful owner of the suit property?
 - (b) Whether the Plaintiff subdivided the suit land and transferred the same to the late Newton?
 - (c) Whether the late Newton Mukunya's claim under customary trust was capable of granting exclusive possession to the Defendant.
 - (d) Whether the late Newton Mukunya's claim under customary trust superseded the Plaintiff's right to apportion [the suit land] to her daughters.
 - (e) Whether the Plaintiff's late son had the authority to lease out the suit land to the Defendant.
 - (f) Whether there was trespass by the Defendant and if an order of permanent injunction should issue.
 - (g) Whether the Plaintiff is entitled to general damages?
 - (h) Who bears the costs of the suit?
32. The Plaintiff relied on the provisions of Sections 24 and 26 of the [Land Registration Act](#), to foreground the argument that being the registered owner of the suit land she is protected against any form of infringement by third parties. It was her further submissions that the Defendant failed to present any evidence to demonstrate that the suit land was divided into 2 equal portions of 3 Acres each wherein one portion thereof was allocated to Newton Mukunya.
33. On the issue of customary trust, she argued that the Defendant failed to show that the estate of the late Newton Mukunya asserted a claim founded on customary trust in respect of the suit property before leasing out the same to the Defendant.
34. Reliance was sought in the provisions of Section 28(b) of the [Land Registration Act](#), 2012 and the holding of the Court in the cases of *Cosmas Cheronu & 2 Others Vs Veronica Cheronu* [2021] eKLR; *Alice Wairimu Macharia Vs Kirigo Philip Macharia* [2019] eKLR; *Njenga Chogera Vs Maria Wanjira Kimani & 2 Others* [2005] eKLR; *Muthuita V muthuita* [1982-88] 1 KLR 42; *Isack Kiebia M'Inanga*



Vs Isaaya Theuri M'Lintari & Another SCoK No. 10 of 2015; and, Juletabi African Adventure Ltd & Another Vs Christopher Michael Lockley [2017] eKLR, to anchor the submission that customary trust is proved by availing sufficient evidence.

35. Further, that the Plaintiff's daughters have equal right to be allocated portions of the suit property, pursuant to the doctrine of customary trust. Further, that the late Newton Mukunya lacked the necessary authority to lease out the suit land to the Defendant which makes the Defendant a trespasser onto the property as understood by the Court in the cases of Hosea Nyandika Mosagwe & 2 Others Vs County Government of Nyamira [2021] eKLR; Philip Aluchi Vs Crispinus Ngayo [2014] eKLR; and, Willesden Investment Ltd Vs Kenya Hotel Properties Ltd HCC No. 367 of 2000.
36. It was her further submissions that she is entitled to the grant of a permanent injunction as against the Defendant as sought as well as general damages on account of trespass. Reliance was placed in the judgment of the Court in the case of Duncan Nderitu Ndegwa Vs KPLC Ltd & Another (2013) eKLR and in Halsbury's Laws of England 4th Edition, Vol. 45 at para 26, 1503.

The Defendant's Submissions

37. The Defendant filed written submissions dated 18th November, 2024 through M/S Wainaina Kinyanjui & Co AdvocateS, and submitted that the Plaintiff deliberately concealed the existence of the subdivisions from the Court instead of amending her pleadings accordingly. Further, the Defendant argued that land parcel No. LOC.16/Kigoro/712 no longer exists, and that the no lawful Orders can issue on non-existent land.
38. Further, that the suit property is ancestral land as verified by the copy of the Green card thereto indicating that the subject property initially belonged to one LAWRENCE MUKUNYA MURIU, and was transmitted to his daughter on 4th October 1983. Further, that the suit land was leased to the Defendant by Newton Mukunya who is a son of the registered proprietor.
39. it was further submitted that the relationship between the lessor and the registered owner of the suit land is not so remote as to render the Defendant's claim adventurous. That the Plaintiff's admission as set out on paragraph 39 of her written submissions to the effect that her daughters are entitled to a share of the property under a customary trust constitutes an admission that a customary trust does exist in respect of the subject property.
40. it was further submitted that the Defendant is an innocent lessee, and is caught up in a family dispute wherein, the Plaintiff wishes to disinherit the family of her late son Newton Mukunya.
41. The Defendant further submitted that he paid Ksh.600,000/=, to Newton Mukunya on account of a lease which is set to lapse on 31st March 2027, which was confirmed by DW2 during the trial. He urged the court to dismiss the Plaintiff's claim with costs.
42. This court has considered the available evidence, the written submissions, cited authorities and the relevant provisions of law and finds the issues for determination are;
 - i). Whether land parcel No. LOC.16/Kigoro/712 no longer exists as claimed by the Defendant
 - ii). Whether the Plaintiff's suit is merited.
 - iii). Who shall bear the costs of the suit?



i). Whether land parcel No. LOC.16/Kigoro/712, no longer exists as claimed by the Defendant

43. The Defendant argued and submitted that according to the copy of the Green card in respect of the suit property on record, entry No. 6 thereon clearly indicates that the subject property being LOC.16/Kigoro/712, was sub-divided into three portions on 19th September 2023 to form LOC.16/Kigoro/2758; LOC.16/Kigoro/2759; and, LOC.16/Kigoro/2760. He argued that the register for the suit property was closed on 19th September 2023, following the preceding sub-divisions and no Orders can issue on non-existent land.

44. In the case of Stephen Mwadoro & 56 others vs Alhad Mohamed Hatimy [2020] eKLR, the Court reasoned as follows:

“There is no need of wasting the court’s time on a case where the order sought is incapable of being granted for the non-existence of the subject matter... It was upon the plaintiffs to be precise on what they claim and what they have mentioned is a title that does not exist. On the ground that the title being sought does not exist, this application must succeed, and this suit is struck out.”

45. In the case of Institute for Social Accountability & Another Vs. Parliament of Kenya & 3 Others (2014) eKLR, the Court observed as follows in determining whether to allow the petitioners to amend their consolidated petition:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of facts already pleaded or the relief or remedy claimed, but rather, on the basis of the true state of facts which the parties really and finally intend to rely on. The power of amendment makes the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings”

46. It is noteworthy that the Plaintiff did not apply for amendment of her pleadings to reflect the subdivisions to the suit property which took effect on 19th September 2023, whereas she lodged instant suit on 10th November 2022. In the premises, the Court finds and holds that the Orders sought by the Plaintiff in the instant suit are not capable of being granted on account of non-existence of the title deed under which the suit is hinged.

ii). Whether the Plaintiff’s suit is merited?

47. The main issue in contention in this suit concerns the Defendant’s right of entry into, and to harvest tea leaves from the suit property, which right is contested by the Plaintiff. The Plaintiff has grounded her claim on the fact of her ownership of the said parcel of land, while the Defendant premises his claim on a lease agreement executed with the Plaintiff’s son.

48. The Defendant does not contest the Plaintiff’s ownership of the suit land. However, it is his contention that this Court should not unfairly enrich the Plaintiff by allowing her prayer for permanent injunction against him in light of the aforesaid lease agreement.

49. In the case of Malier Unissa Karim – Versus – Edward Oluoch Odumbe (2015) eKLR, the Court of Appeal distinguished between mandatory and prohibitory injunctions as follows:

“The test for granting a mandatory injunction is different from that enunciated in the “Giella -Versus- Cassman Brown case which is the locus classicus case of Prohibitory Injunctions.



The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of Kenya Breweries Ltd Vs Washington Okeyo (2002) EA 109 had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol.24 Halsbury's Laws of England 4th edition Paragraph 948 which states as follows:

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the plaintiff, a Mandatory Injunction will be granted on an Interlocutory application.”

50. Article 40 of *the Constitution* of Kenya guarantees the right to property. In view of the foregoing, the Court will proceed to determine whether the Defendant is a trespasser onto the suit land or not. Whether the defendant has any color of light to harvest tea leaves from the suit property is dependent on this Court's verdict concerning the validity of the lease agreement alleged to have been executed between the Defendant and the Plaintiff's son Newton Mukunya Ndung'u (deceased).
51. The Court of Appeal in the case of MBOOTHU and Others v WAITIMU & 11 others 1980 K.L.R. 171 stated as follows:

“The law never implies, the Court never presumes a trust but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”.
52. Part of the evidence adduced in this suit includes proceedings filed before the Chief Magistrates Court at Kandara, which proceedings were between the Plaintiff herein and DW2 Margaret Maina, the alleged widow to the late Newton Ndung'u, over the same suit land. In her written statement filed on 22nd September 2022, the Plaintiff herein referring to the late Newton Mukunya Ndung'u and the suit property, states as follows:

“When I took my son in, he was broke and in really bad shape as he had gotten into a habit of drinking and so I found it fit that I assign him the suit land for purposes of having him get his life back on track as he was looking for a new meaning in life”.
53. From the foregoing admission by the Plaintiff, it is clear that the late Newton Mukunya Ndung'u, was settled on the suit property with the authority given by the Plaintiff and he obtained a KTDA Growers Certificate, with the local tea factory in respect of his tea crop. The said late Newton Mukunya Ndung'u subsequently entered into a lease agreement with the Defendant allowing the Defendant to pick tea leaves from the suit property in exchange for the sum of Kshs.600,000/=, advanced to him by the Defendant as per agreement dated 8th March, 2021 on record.
54. The Plaintiff cast doubt on the capacity of her son Newton Mukunya Ndung'u to enter into a lease agreement concerning the suit land as he was not the registered owner thereof. It is trite that under the principles of the law of agency, an act can be imputed on a party (the principal) where the aforesaid act was done by another party (an agent) having the ostensible/apparent authority to act on behalf of the principal. The Court of Appeal in the case of Total Kenya Ltd -Vs- D Pasacon General & Electrical



Cal Services (Civil Appeal 119 of 2019) –[2022] KECA 593 (KLR) citing Black’s Law Dictionary, 9th Edition, at Page 72, defines an apparent agent as follows:

“A person who reasonably appears to have authority to act for another, regardless of whether actual authority has been conferred – also termed ostensible agent”.

55. It is not disputed that the late Newton Mukunya Ndung’u is the Plaintiff’s son, and resided on the suit land together with his family, with the consent of the Plaintiff. The Court holds and finds that the late Newton Mukunya Ndung’u’s transferred his KTDA Growers Certificate to the Defendant pursuant to the lease agreement dated April 2021, and allowed the defendant to harvest tea leaves from the suit land between April 2021 until his death in September 2022, which constitutes conclusive proof of the existence of the lease agreement adverted to by the Defendant.
56. Having determined that the late Newton Mukunya Ndung’u possessed the requisite legal capacity to lease out the suit land, the Court holds and finds that a valid lease agreement with the defendant exists in regard to the suit property. In the circumstances, it is holding and finding of the Court that the Defendant herein is not a trespasser with respect to the suit land as claimed by the Plaintiff.
57. Consequently, having considered the evidence in totality, it is the findings of this court that the Plaintiff has failed to prove her case on the required standard of balance of probabilities. For the above reasons, this court holds that the Plaintiff’s suit is not merited.

iii). Who shall bear the costs of the suit?

58. On the issue of costs, the court will be guided by the provisions of section 27 of the [Civil Procedure Act](#), which provides: -

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such”.

[\[Act No. 19 of 1985, Sch.\]](#)

59. Ordinarily costs are granted at the discretion of the court, and are awarded to the successful litigant. The Defendant herein is the successful litigant and is thus awarded costs of this suit.
60. In a nutshell, this court finds and holds that the Plaintiff has failed to prove her case on the required standard of balance of probabilities, and thus her suit is not merited. The court proceeds to dismiss the Plaintiff’s suit entirely with costs to the Defendant herein.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JANUARY 2025.



L. GACHERU

JUDGE

29/1/2025

Delivered online in the presence of:

Joel Njonjo – Court Assistant

N/A for the Plaintiff

Mr Wainaina for the Defendant

L. GACHERU

JUDGE

29/01/2025.

