



Roge v Songok & 3 others; Mweka (Interested Party) (Environment & Land Case 13 of 2019) [2025] KEELC 349 (KLR) (29 January 2025) (Judgment)

Neutral citation: [2025] KEELC 349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 13 OF 2019**

**JM ONYANGO, J
JANUARY 29, 2025**

BETWEEN

JOHN MUHIA ROGE PLAINTIFF

AND

DAVID SONGOK 1ST DEFENDANT

TERESA KEMBOI 2ND DEFENDANT

COUNTY GOVERNMENT OF UASIN GISHU 3RD DEFENDANT

**MINISTRY OF LANDS, HOUSING AND PHYSICAL PLANNING 4TH
DEFENDANT**

AND

RODA MWEKA INTERESTED PARTY

JUDGMENT

1. The Plaintiff commenced this suit vide a Plaint dated 30th January, 2019 and amended on 16th November, 2022 against the Defendants jointly and severally seeking the following Orders: -
 - a. A Permanent Injunction to restrain the Defendants, their agents, servants and whomsoever acts for them from interfering with land parcel Eldoret Municipality Block 14/1517.
 - b. An Order that the 2nd Defendant and her Co-Administrators do execute transfer of the land to the Plaintiff and in default the Court Executive Officer to do so and have the land transferred to the Plaintiff. A Declaration that the Plaintiff is the bonafide owner of that parcel of land known as Eldoret Municipality Block 14/1517 and the acts of the Defendants amount to trespass.
 - c. General damages.



- d. Compensation as per clause 11A.
 - e. Compensation as per clause 11B.
 - f. Costs of the suit.
 - g. Any other relief as the court may deem fit and just to grant.
2. The Plaintiff avers that on or about 23/2/1976 he entered into a contract for the sale of land with Paul K. Kemboi (now deceased) for the purchase of 5 Acres to be excised from L.R. No. 8746 for a consideration of Kshs. 50,000/= which he paid in full in two instalments. He thereafter took possession of the said land and constructed semi-permanent buildings where he lives as well as other residential units. The said portion of 5 Acres was then designated as Plots 656,257, 258, 259 and 260 on the proposed development plan of L.R. No. 8746.
 3. He contends that sometimes in the year 1980, the Government of Kenya sought to compulsorily acquire the suit land No. L.R. No. 8746 for public utilities. However, through the intervention of the land owner Paul Kemboi, the plaintiff's 5 Acre portion among other parcels were left out of the compulsory acquisition process. The said parcel was subsequently given the number Eldoret Municipality Block 14/1517.
 4. The plaintiff's case is that he was issued with a Letter of Allotment Ref No. 134568/3 dated 26th June, 1992. He subsequently complied with all the requirements in the said letter of allotment and he thus maintains that he is the owner of the suit land.
 5. It is the plaintiff's claim that sometimes in the month of November 2018, the 3rd Defendant, without any colour of right, permission or consent, invaded the suit property, demolished all the structures on the suit land and chased away all his tenants, which action he contends amounts to trespass.
 6. It is further his claim that as a result of the 3rd defendant's invasion and destruction, he has suffered loss of properties valued at Kshs. 4,158,000/= and lost income from his 100 units at a monthly income of Kshs. 1,800/= for a period of 48 months amounting to Kshs. 8,640,000/=.
 7. The plaintiff also avers that he has been in occupation of the suit parcel since the year 1976, he has constructed semi-permanent structures and planted trees on his portion of land. He maintained that the Defendants do not have any colour of right over his piece of land and thus urged the court to allow his claim against the defendants with costs.
 8. Despite being duly served with the Summons to Enter Appearance and the pleadings none of the defendants filed a statement of defence within the requisite period. I must however point out that the 3rd defendant filed a statement of defence dated 5.10.2022 without leave of court and vide the proceedings of 5.10.2022 before Hon. E. Obaga, the said defence was struck out. Therefore, there was no statement of defence in response to the allegations made by the plaintiffs by any of the defendants on record save for the Interested Party.
 9. The Interested Party was joined in the suit on 25th February 2019. She filed a Statement of Defence and Counter-claim dated 11.3.2019 and Amended on 4th July, 2023. She denied the allegations made in the plaint and put the plaintiff to strict proof thereof.
 10. It was her contention that being an employee of Eldoret Municipal Council, she was allocated the suit parcel No. Eldoret Municipality Block 14/1517 by the then town clerk. That during the post-election violence, she was evicted from the said land. She thereafter petitioned the National Land Commission



- who allocated her one acre. She constructed a semi-permanent structure, ploughed a portion thereof and planted trees as she waited for the ownership documents.
11. She further avers that sometimes around February 2016, the Chairman of the National Land Commission instructed the Director of Land Administration to issue her with an allotment letter of the suit property. a Part Development Plan (PDP) was prepared, gazetted and approved. That upon being allocated the said one acre portion of the suit land, she took possession and has been living peacefully without any interruption.
 12. She partly admitted the contents of paragraph 11 of the plaint to the extent that the 3rd defendant moved into the suit land but maintained that it was her house that was demolished. She maintained that her occupation of the suit land was not as a tenant of the plaintiff but as an owner thereof. It was her claim that the one-acre portion of the suit land belongs to her and the plaintiff's claim over the same has no basis at all and the plaintiff is therefore not entitled to the orders sought.
 13. In her Counter-claim; the Interested Party sought the following orders: -
 - i. The sale of land agreement dated 23rd February, 1976 as relates the portion of land allocated to the Interested Party by the 3rd Defendant is null and void to the extent of its inconsistency with the portion allocated to the Interested Party.
 - ii. The name of the 3rd Defendant being indicated as the registered owner of Eldoret Municipality Block 14/1517 be erased, expunged and/or amended to indicate and/or state the Government of Kenya.
 - iii. The County Executive Committee member, Land's Housing and Physical Planning, an office under the 3rd defendant; be compelled to issue the Interested Party a recommendation letter, for issuance of an allotment letter.
 - iv. The Interested Party be deemed to the bonafide owner of PDP No. Eld 17/2016/02 Eldoret Plan No. 451.
 - v. The 3rd Defendant be compelled to compensate the Interested Party for acts of destruction and/or demolition of the Interested Party's homes.
 14. She consequently urged the court to allow her Counter-claim and grant the orders sought with costs.
 15. In his response to the Statement of Defence and Counter-claim filed by the Interested Party, the plaintiff denied the averments made by the Interested party and put her to strict proof thereof. He reiterated the averments made in the amended plaint and maintained that the suit land had already been alienated as at the time the Interested Party purports to have been allocated and was thus not available for alienation.
 16. He dismissed the PDP Ref. No. ELD/17/2016/02 relied on by the Interested Party and asserted that the same was never approved. He also denied knowledge and existence of Chief Magistrates Civil Case No. 137 of 2018 and stated that he was not aware if any orders were issued therein.
 17. In response to paragraph 12A, he reiterated that the lessor of the suit land was the Government under the Commissioner of Lands and not the defunct Municipal Council of Eldoret hence any document issued by the Municipal council is null and void without any force in law. He thus urged the court to dismiss the counter-claim with costs.



Plaintiff's Case

18. The hearing of the Plaintiff's case commenced on 4.6.2024. The Plaintiff testified as PW1. He adopted his witness statement dated 4.5.2020 as his evidence in chief. He further stated that he bought the suit parcel from one Paul Kemboi, who was the registered owner of the suit land, pursuant to a sale agreement dated 23.2.1976 (PEX. 3) and paid the entire agreed purchase price of Kshs. 50,000/=
19. That the payment of the said purchase price was made in two instalments and an acknowledgement receipt issued to that effect (PEX. 4). Upon full payment of the purchase price, he fenced the suit land and constructed a residential house and rental houses, he produced the photos of the said houses as exhibits (PEX. 5)
20. He further testified that sometimes in the year 1980, the entire farm owned by Paul Kemboi was acquired by the Government of Kenya. But Mr Kemboi appealed to the Commissioner of Lands to spare the parcel he had sold to him. Since there was no response from the Commissioner of Lands, he to applied for a Letter of Allotment of the purchased portion of land and he was subsequently issued with a Letter of Allotment dated 26.6.1992 (PEX. 8). He wrote a letter of acceptance, wherein he agreed to abide by all the conditions outlined in the allotment letter.
21. He told the court that he paid a sum of Kshs. 433,000/= and he was issued with receipt No.47991358 dated 13.5.2015. The Registry Index Map was subsequently amended.
22. He was then given a map with his plot marked in red and he thereafter continued to enjoy his occupation and development since then until sometimes in the year 2018.
23. It was his further evidence that in the year 2018, the County Government of Uasin Gishu demolished all his houses and other properties which were all valued at Kshs. 12,798,000/=. He maintained that he had never received any notice cancelling the Letter of Allotment. He stated that no other person had ever occupied his plot.
24. He thus urged the court to declare him as the owner of the suit property and to grant the orders sought in the Amended Plaint dated 17.11.2022. He also produced the documents in his lists of documents dated 4/5/2020, 6/12/2022 and 11/1/2024 as Plaintiff's Exhibits 1-19 in support of his case.
25. On cross-examination, he stated that he was not aware of any other properties demolished by the County Government of Uasin Gishu. He further denied knowledge of the existence of dispute over the suit parcel with the interested party.
26. He conceded that he was not certain whether the PDP that he was issued with was gazetted. He further conceded that the payment receipt dated 13.5.2015 (PEXA 11) bears the reference number 13456813 but maintained that the said reference number had nothing to do with the reference number on the Letter of Allotment. With that evidence, the Plaintiff closed his case.

Defence Case

27. The defence case came up for hearing on 22/7/2024 but since the Defendant's defence had been struck out he did not tender any evidence
28. Isaac Alinga Andeche, holder of Power of Attorney dated 6/6/2023, donated by the Interested Party Rhoda Mweka, testified on behalf of the Interested Party as DW1. He relied on his witness statement dated 11.11.2019 as his evidence in chief.



29. He produced the witness statement by Rhoda Mweka as an exhibit (DEX 1) and the documents contained in the List of Document dated 4.7.2023 as DEX 2 – 19 in support of the Interested Party’s claim. He urged the court to grant the orders sought in the Amended Defence and Counter-claim.
30. On cross- examination, he conceded that he did not physically appear before an advocate at the time of executing the Power of Attorney dated 6/6/2023, but that the document was sent to him in the USA and he signed. He further stated that the interested party suffers from dementia but that at the time of executing the Power of Attorney she was fit to do so though he conceded that no medical proof had been adduced to prove the same.
31. He also conceded that he did not produce any Letter of Allotment as proof that his mother was given the suit land or by the Eldoret Municipal Council or by the Ministry of Lands. He further confirmed that they have never made any payments to the County Government of Uasin Gishu.
32. When referred to the letter 17.12.2018, he confirmed that the land belongs to the Government of Kenya and conceded that Municipal Council did not have the powers to issue leases. He was also referred to the letter dated 21.10.2020 from Nelson K. Maritim, which stated that as at 21.10.2020 there was no Part Development Plan (PDP).
33. He further testified that from his list of documents he produced a White Card which showed that the lessor is the Municipal Council of Eldoret but he conceded that the municipality had no authority to issue leases. He acknowledged that the plaintiff produced an allotment letter dated 26.6.1992 and a PDP dated 22.5.1992 while the PDP produced by the interested party is dated 17.9.2019. Even though he stated that he produced pictures showing that his mother was living on the suit land, from the exhibits produced in court during the hearing, there was no such exhibit.
34. In re-examination, he clarified that his mother lived on the suit land between the year 2010 to 2018 when her house was demolished but that the entire suit land is currently occupied by squatters. With that evidence, the Interested Party closed her case.
35. Since the defendants did not offer any evidence, the defendants’ case was marked as closed.
36. After the close of the defence case, the parties were directed to file their final written submissions. The plaintiff filed his submissions dated 7th August, 2024 together with authorities while the Interested Party filed her submissions dated 15th August, 2024 together with authorities which I have read and considered.

Plaintiff’s Submissions

37. Counsel for the plaintiff submitted that prior to the promulgation of the 2010 Constitution and the amendment of the land laws, disposition of government land was governed by the Government [Land Act](#) (Repealed) and that the power to dispose of public land was vested in the president and the Commissioner for Lands pursuant to sections 3 and 9 respectively.
38. He gave a detailed step by step process that must be duly followed and relied on the following cases; Harrison Mwangi Nyota vs Naivasha Municipal Council & 20 Others [2019] eKLR, Nelson Kazungu Chai & 9 Others vs Pwani University College [2014] eKLR, Gladys Wanjiru Ngacha vs Teresa Chepsaat & 4 Others 182 of 1992, which outlined the process to be followed in the alienation of public land.
39. He maintained that the plaintiff complied with all the procedures as statutorily outlined except the last part of issuance of the Certificate of Lease. That the plaintiff was issued with a PDP which was



- approved on 22.5.1992 and a letter of allotment Ref. No. 134568/3 on the 26.6.1992, an Acceptance Letter dated 29.6.1992, which were all produced as PEX. 8, 9 and 10 respectively.
40. He further submitted that the plaintiff complied with all the conditions as outlined in the Allotment Letter including the payment of the stand premium and ground rent of Kshs. 433, 490/= paid on 13.5.2015 through receipt No. 4791358 and produced as PEX. 11. He however argued that the letter of allotment did not indicate the timeframe for the payment of the said amount.
 41. He thus maintained that the plaintiff's interest in the allotted land is legitimate and confers in him an interest to be protected by the law and urged the court to grant the orders sought.
 42. It was also his submission that no evidence was produced by the Interested Party that the allotment letter issued to the plaintiff was acquired through fraud or misrepresentation, cancelled or held to be invalid in any way and consequently, the land in question was not available for allotment to him as alleged. It was his further contention that the Commissioner of Land or his successor, the National Land Commission has not challenged the letter of allotment held by the plaintiff.
 43. Counsel also cited the decision in the case of M'Ikiara N'Rinkanya & Another vs Gilbert Kabaazre M'mbijiwe (1982 – 1988) IKAR 196 where the court held that where there is double allocation of land the first allotment prevails and there is no power to allot the same property again. He submitted that the plaintiff further confirmed that the amended RIM converted the suit land to Eldoret Municipality Block 14/1517.
 44. On whether there was trespass, it was counsel's submission that the 3rd defendant ought to have issued an enforcement notice before carrying out any demolition. It was his contention that failure to issue the notice as statutorily required amounts to trespass on the plaintiff's parcel of land. He relied on the provisions of section 38 of the Physical Planning Act and section 72(1) of the Physical Use Planning [Act No. 13 of 2019](#).
 45. He further submitted that as a result of the trespass on the part of the 3rd defendant, the plaintiff is entitled to general damages for trespass and urged the court to award a sum of Kshs. 10,000,000/=.
 46. He also sought special damages as pleaded under paragraphs 11A and B of the Amended Plaintiff and relied on the findings and recommendations in the Valuation Report which quantified the loss incurred from the lost income and the destruction of property.
 47. On the Interested Party's Counter-claim; counsel submitted that the Power of Attorney allegedly donated to one Isaac Alinga Andeche was irregular and that the same ought to be struck out and the evidence and testimony of the said Isaac be disregarded in its entirety.
 48. He dismissed the claim by the Interested Party that she was allocated the portion she is claiming by the 3rd defendant and maintained that the subject land was government land and hence its allocation was through the Commissioner of Lands and not the 3rd defendant as alleged. Therefore, the alleged allocation by the 3rd defendant was illegal and could not confer any interest to a party.
 49. Further, that upon complying with all the conditions set out in the letter allotment and which letter was never revoked or cancelled by the Commissioner of Lands, the subject land was not available for allocation. He dismissed the PDP issued on the 17/7/2019 after the case was filed in court which the Interested Party relied on as null and void. In conclusion, counsel for the plaintiff urged the court to find that the plaintiff's suit is merited and to allow the same and to dismiss the Interested Party's suit with costs.



Interested Party's Submissions

50. The Interested Party's main claim is that a portion measuring 1 Acre belongs to her and she dismissed the claims by the plaintiff and the defendant with regards to the said portion. She submitted on 3 issues; whether she was the bonafide owner of a portion of the suit land measuring 1 acre allocated to her, whether the sale agreement dated 23/2/1976 is null and void and compensation for the destruction of property.
51. On the first issue, she submitted that the suit land was allocated to her by the Ministry of Lands and Physical Planning. She also outlined the step-by-step procedure to be complied with in the disposition of a government land. She maintained that the necessary steps, including the preparation of the PDP and the process of issuing an allotment letter had all commenced as directed by the chairman of the National Land Commission. It was her contention that she had diligently pursued the ownership documents and asserted that she holds a valid and enforceable claim to a portion of the suit land.
52. On the validity of the plaintiff's sale agreement dated 23.2.1976, she submitted that her claim over the disputed land parcel takes primacy and that the same is supported by the various documents tendered in evidence, including the PDP No. 451 (PDP NO. ELD/17/2016/02) prepared in the year 2016 in favor of the interested party and approved by the Cabinet Secretary, Ministry of Lands and Physical Planning on 22.7.2019. It was her further submission that the National Director of Physical Planning recommended that the earlier allocations be expunged and the ownership documents be processed in the name of the interested party and she maintained that she was the first beneficiary.
53. On the issue of compensation for the destruction of her property; she relied on the provisions of Article 40 of *the constitution* on the right to property. She submitted that the plaintiff and the 3rd defendant trespassed into her property. That the 3rd defendant unjustly moved into her land and demolished her home, cutting down her trees and began fencing and ploughing.
54. She thus sought damages for the reinstatement of her property or for the diminution in its value and for the violation of her rights under Article 40 of *the constitution*. She urged the court to allow the counter-claim as sought.

Analysis and Determination

55. I have carefully considered the pleadings, the oral and documentary evidence adduced by the plaintiff and Interested Party and the rival submissions. In that regard, I am of the considered view that issues arising for determination are as follows: -
 - i. Who is the registered proprietor of land Eldoret Municipality/ Block 14/1517?
 - ii. Whether the Plaintiff has any proprietary/equitable interest over the suit property that is capable of protection.
 - iii. Whether the interested party has any proprietary/equitable interest over the suit property.
 - iv. Whether the defendants trespassed into the plaintiff's land
 - v. Whether the plaintiff is entitled to the reliefs sought
 - vi. Whether the Interested Party's Counter-claim dated 4th July, 2023 is merited.
 - i. Who is the registered, proprietor of land parcel number Eldoret Municipality/ Block 14/1517



56. Both the plaintiff and the interested party claim that they are the beneficial owners of the suit land and hence hold proprietary interests over the same. It is however not in dispute that the suit land was initially registered in the name of the 3rd Defendant. Unfortunately, the 3rd Defendant did not tender any evidence in court to prove the current status with regard to registration of the suit property as their defence was struck out for having been filed out of time without leave of the court.
57. Since both the Plaintiff and the Interested Party are claiming proprietary rights over the suit property, it is important for this court to interrogate the root of each claim and ascertain who holds a proprietary or equitable interest in the suit land.
58. The procedure governing alienation of government land is now well settled, the same is statutorily enshrined and has further been established by a long line of authorities which I do not seek to reinvent. Parties are under a duty to prove to the required standard that every step of the said process/procedure was strictly complied with and that the special conditions have been met. At the time of the allocation of the suit property to the plaintiff, the same was governed by the provisions of the Government Lands Act (now Repealed) and this court will therefore make reference to the same.
59. The court in the case of *Kenya African National Union v Cabinet Secretary Ministry of Lands & Physical Planning & 5 others (Environment & Land Petition E025 of 2020)* [2024] KEELC 4563 (KLR) (3 June 2024) (Judgment) in discussing the process of alienation of public land outlined in detail each step to be followed from paragraphs 79 - 89. The court went on to state that: -
- “..... Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline....”
60. The plaintiff produced the following documents as exhibits; a copy of the letter of allotment dated 26.6.1992 as PEX. 8, a copy of the PDP, letter of acceptance dated 29.6.1992, payment records/receipts and a letter in support of his proprietary claims. The said letter of allotment outlined special conditions to be complied with to wit; a letter of acceptance, payment of Kshs. 433, 490/= payable vide a cheque. He confirmed having fully complied with the said conditions and produced all the requisite documents in support of his ownership claims save for a title document which he maintained that efforts to obtain the same from the defendants have been futile hence the instant suit.
61. I must however point out that on a cursory look of the said letter of allotment; the period for the payment and acceptance is not legible and this court is therefore unable to state with certainty the stipulated period. The plaintiff in his submissions conceded that the period within which the Plaintiff was supposed to pay the amount stated in the allotment letter was not clear but he maintained that the Plaintiff had complied with the terms in the Letter of allotment. Be that as it may, there was no evidence that that the allotment letter was cancelled.
62. In view of the foregoing it is my considered opinion that the plaintiff having been issued with an allotment letter dated 26.6.1992 by the Commissioner of Lands and having complied with the terms in the letter of allotment, the Plaintiff has an equitable interest in the suit property.
- ii. Whether the defendant has a proprietary or equitable interest over the suit property



63. In determining this issue, the question that begs is whether the suit land having been procedurally allocated to the plaintiff, was available for re-allocation to the interested party. It is trite law that upon issuance of an allotment letter, its subsequent acceptance and a fulfillment of the conditions stipulated therein, an allotment letter confers absolute right of ownership over the subject land and in the circumstances the land in question cannot be offered to someone else.
64. As held above, the allocation of the suit property to the plaintiff was carried out in the year 1992 whereas the alleged allocation in favor of the Interested Party was in the year 2016. It therefore follows that any purported allocation after the year 1992 was not feasible since the said land was not available for alienation and further, the earlier allocation has never been cancelled and/or revoked by the issuing authority.
65. The Court of Appeal in the case of *Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another in Kisumu HCCCA No.9 of 2004* (unreported) held thus: -
- “...once allotment letter is issued and allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was outrightly illegal or it was against public interest. In other words, where land has been allocated, the same cannot be re-allocated unless the first allocation is validly and lawfully cancelled.”
66. This position was reiterated in the case of *Republic vs City Council of Nairobi & 3 Others* (2014) eKLR, Odunga J. (as he then was) held as follows: -
- “once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation s validly and lawfully cancelled”.
67. Other than the PDP and the various letters/correspondence between the interested party, chairperson National Land Commission and the Ministry of Lands, no document has been produced by the interested Party vesting any proprietary or beneficial rights in her and which can be said to take primacy over the plaintiff's claim. The PDP and the various letters, some of which directed that she be given the land or that she should not be harassed, are in my considered view not sufficient to grant any proprietary interest over the suit land.
68. The law of evidence is clear in this regard that he who alleges must prove. It is now well settled that in order for one to prove that there was alienation and/or disposition of government land, he must demonstrate that he was issued with an allotment letter and that he fully complied with the conditions and terms stipulated therein. It is only then that one can be said to be holding any interest in the subject land. In the absence of the said allotment letter, acceptance letter and any other documents outlining the compliance with the various conditions therein, the Interested Party's claim remains unsubstantiated.
69. It is not enough to merely state that she was an employee of the Municipal council and that it is on that basis that she was allocated the suit land. The land must be available for alienation and/or allocation before the entire process can even begin. During cross-examination, DW1 conceded that he did not produce any letter of allotment as proof that his mother was given the suit land either by the Eldoret



- Municipal Council, the Ministry of Lands or the National Land Commission (NLC). He further confirmed that his mother never made any payments to the County Government nor produced any Acceptance letter.
70. Further, from the letter dated 17/12/2018 and which she relied on it is clear that the said land was not available for allocation nor was it supposed to be allocated by the Eldoret Municipal Council. The letter from the County Land Office to the Commissioner NLC on the status of the suit land, reads in part as follows; -
- “The records available at the registry shows that there exists a lease from Eldoret Municipal Council to Charles Malakwen, Hosea Kiplagat Choge, Mahowk Luoyo, James Kibet Kimboi, Beatrice J. Sawe. The said lease is for 99 years from 1.12.2004 and was registered on 20.12.2014. However, the lease is suspect because this is an area for Government Leases not Municipal Leases.”
71. Further, her testimony on occupation is not air-tight. On one hand, she claims that she was residing on the suit land until the post-election violence, in her submissions she contends that she had been residing on the land until the plaintiff and the 3rd defendant’s encroached into her land and destroyed her property. During cross-examination, DW1 conceded that no photographic evidence had been produced to show that they lived or even had property on the suit land.
72. In the premises, it is my finding that the Interested Party has failed to prove that she has a proprietary or equitable interest over the suit property or any part thereof.
- iii. Whether the defendants trespassed into the plaintiff’s land
73. 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.”
74. Section 3 (1) of the Trespass Act 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.”
75. 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’.
76. The plaintiff claims that the 3rd defendant without any lawful justification encroached into his parcel of land, destroyed his residential home and other rental units. He produced a bundle of photographs showing the developments on the suit land and the remains after the destruction by the 3rd defendant as PEX 5 and 12. However, with regard to the rental income, the Plaintiff did not produce any bank statement or accounts to show how much rent he was receiving per month.
77. The plaintiff further contended that the 3rd defendant ought to have issued an enforcement notice before carrying out any demolition. That failure to issue the notice as statutorily required amounts to trespass on the plaintiff’s parcel of land and relied on the provisions of provisions of section 38 of the Physical Planning Act and section 72(1) of the Physical Use Planning Act No. 13 of 2019.



78. Despite being given an opportunity to respond to the allegations raised by the plaintiff, the 3rd defendant failed to file a statement of defence within the requisite timeframe or give an explanation and a reasonable justification for their entry into the suit land and destruction of the properties. Without any evidence as to the contrary, it is my considered opinion that the acts of the 3rd defendant amount to trespass to land.

iv. Whether the plaintiff is entitled to the reliefs sought

79. The Plaintiff seeks special and general damages as well as a declaratory order and a permanent injunction. With regard to special damages the plaintiff sought compensation for the loss incurred as a result of the destruction of the properties by the 3rd defendant. He produced a copy of a Valuation Report dated 4/10/2022 from Sterling Valuers Ltd which placed the value of the properties that were destroyed at Kshs.12,798,000/=. However, a close scrutiny of the said report reveals that the rental income of Kshs. 8,64,000/= is unsubstantiated. Consequently, I award special damages in the sum of Kshs. 4,158,000/=.

80. With regard to general damages, it is settled law that trespass to land is actionable per se, that is, without proof of any damage). In *Park Towers Ltd vs. John Mithamo Njika & 7 others* (2014) eKLR where J.M Mutungi J. held that: -

“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...”

81. In *Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another* [2013] eKLR it was held that damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.

82. It is therefore my considered opinion that the plaintiff is entitled to general damages for trespass in the sum of Kshs. 300,000/-

83. The Plaintiff is also entitled to an order of permanent injunction restraining the defendants from interfering with the suit property.

84. The Plaintiff sought an order that the 2nd defendant and here co-Administrators do execute a transfer of the suit property in his favour and in default the Executive Office of the Court be directed to do so. From the evidence on record it is clear that the suit property is not registered in the name of the 2nd defendant or any of the administrators of the estate of Paul Kemboi deceased and it would be futile to issue such an order. Having obtained a letter of allotment from the Government of Kenya and noting that the land was registered in the name of the 3rd Defendant, the said transfer can only be effected by the 3rd Defendant.

v. Whether the Interested Party's Counterclaim dated 4.7.2023 is merited

85. As observed earlier in this judgment, the Interested Party did not produce any letter of allotment to show that the suit property was allocated to her. What she produced was correspondence from the Ministry of Lands, national Land Commission and other government offices indicating that she wished to be allocated the suit property.



86. Having held that the plaintiff proved that he was validly allocated the suit land and therefore has an equitable right thereto, the Interested Party's Counterclaim dated 4th July 2024 to a portion of the suit property measuring one acre cannot succeed.

Conclusion

87. The upshot is that the Interested party's Counterclaim is dismissed. On the other hand, Plaintiff has largely proved his case on a balance of probabilities and I hereby enter judgment for the Plaintiff on the following terms: -

- i. An order of Permanent Injunction is hereby issued restraining the Defendants, their agents, servants and whomsoever acts for them from interfering with land parcel Eldoret Municipality Block 14/1517.
- ii. An Order be and is hereby issued directing the 3rd to facilitate the registration of the suit land in favor of the plaintiff within a period of 90 days.
- iii. A Declaration is hereby made that the Plaintiff has an equitable interest in the parcel of land known as Eldoret Municipality Block 14/1517 and the acts of the Defendants amount to trespass.
- iv. The Plaintiff is awarded special damages in the sum of Kshs. 4,158,000/= to be paid by the 3rd Defendant.
- v. The 3rd defendant shall pay the Plaintiff general damages for trespass in the sum of Kshs. 300,000/=.
- vi. The Costs of the suit shall be borne by the 3rd Defendant.
- vii. The Interested Party's Counter Claim is dismissed with no order as to costs.

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

J. M. ONYANGO

JUDGE

In presence of; -

Miaa Kinyanjui for Mr. Mathai for the Plaintiff

No appearance for the Defendants

No appearance for the Interested Party

Court Assistant – Hinga

