



**Chuchunei (suing as the legal representative of the estate of Samwel Rono
(Deceased) & 2 others v Mosonik (Environment and Land Case Civil
Suit 33 of 2015) [2022] KEELC 3064 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3064 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND CASE CIVIL SUIT 33 OF 2015**

MC OUNDO, J

JUNE 16, 2022

BETWEEN

**SALLY CHELANGAT CHUCHUNEI (SUING AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF SAMWEL RONO**

(DECEASED) 1ST PLAINTIFF

JOSEPH MALAKWEN RONO 2ND PLAINTIFF

SARAH CHEPKURUI KOSKEI 3RD PLAINTIFF

AND

STEPHEN MOSONIK DEFENDANT

JUDGMENT

1. *Vide* a Complaint dated 2nd July 2015 and amended on 17th July 2019, the Plaintiffs herein seeks for orders that there be a declaration that they are the lawful owners of all that parcel of land registered as Kericho/Silibwet/2972 and that there be a perpetual injunction restraining the Defendant, his agents or servants from interfering with the same. The Plaintiffs further seek for general damages for trespass, interest accrued thereon as well as any other relief that the court may deem fit to grant.
2. The defence entered its Memorandum of Appearance as well as the statements of defence dated 18th of August 2015 on 9th May 2016 wherein he denied the Plaintiff's allegations as contained in the Complaint stating that his father, the deceased Eric Kargetet had been in occupation of the disputed parcel of land since the 1960's wherein upon his demise in October 2011, the Plaintiffs herein had started encroaching on the said portion claiming ownership despite there having been the evidence of old eucalyptus trees which had been planted by his father in 1980 being on the ground.
3. The matter proceeded for hearing on the 28th June 2017 wherein Joseph Malakwen Rono testified as PW1 to the effect that he resided in Bomet and was a farmer. That land parcel No. Kericho/



Silibwet/2972 was owned by Joseph Rono, Maruko Rono, Samwel Rono and Sarah Kosgey as per the certificate of official search dated 2nd July 2015 which he produced as Pf exh 1. He also produced as Pf exh 2, a copy of the Green Card in respect of the suit parcel which showed that the same had been a subdivision of parcel No. Kericho/Silibwet/2448 which was also a subdivision of parcel No. Kericho/Silibwet/806 as per the said certificate of Registration herein produced as Pf exh 3.

4. The witness further produced the Registry Index Map (RIM) for land parcel No. Kericho/Silibwet/806 as Pf Exh 4 and went on to testify that Joseph Mosonik the Defendant herein had trespassed onto their land parcel No. 2972 and planted eucalyptus trees in January 2014. He produced the photographs of the trees as Pf exh 5.
5. His testimony was that the Defendant had not informed him why he had planted trees on their parcel of land and despite having informed him to remove the same his plea fell on deaf ears. That he had subsequently involved the Land Registrar and Surveyor to help him resolve the dispute wherein they had visited the suit land in the year 2014 with a map of the suit parcel. He produced a letter dated the 4th August 2014 as Pf exh 6 as well as a report from the District Land Registrar relating to their visit as Pf exh 7.
6. His further evidence was that although they shared a common boundary with the Defendant, however the same was separated by a road. That through his advocate, he had written a demand letter, herein produced as Pf exh 8, to the Defendant to vacate his land in vain and therefore he had sought for an eviction order from the court to issue against the Defendant.
7. On cross examination by the Defendant, the witness reiterated his evidence that the trees had been planted in the year 2014 and that when the officials from the Land Registry had visited the suit land, they had prepared a report of what they had found on the ground which report he had produced in court. He also stated that he did not know whether his mother had crushed any stones on the road.
8. That his father had given them a small parcel of land which was less than a quarter of an acre to share with his four brothers wherein one of his brothers had fenced his own parcel of land. That he now lay claim on his own land and it did not matter whether or not he had made use of it. That he had used the land for grazing and had not objected when the Defendant's father had planted trees on the suit land in 1982 although that did not make it right. He also confirmed that he had involved the Elders to resolve the land dispute although he did not have any documents to that effect.
9. When re- examined, the witness reiterated that the land had been subdivided in the year 2011 which was not the time he had sought from the Defendant to remove the trees.
10. The second Plaintiff witness, Sarah Chepkurui Koskei also testified that she lived in Bomet and was a farmer. That although the Defendant was a relative, yet he had planted trees on their parcel of land in the year 2014. That they had asked him severally to remove the trees in vain. She thus sought for the court to order him to remove the trees and to restrain him from interfering with their land.
11. On being cross-examined by the Defendant, she responded that she was 68 years and that in the year 1982 she had been six years old and in class 2. That she had attended Tenwek Primary School and had seen the Defendant plant the trees in 2014. That she did not know if he had planted the trees in 1982, since she had been young at the time. That she also did not know whether he had planted trees in 2005. That they had sued him because he had planted trees on their land, land which they had been using to graze their cattle. She also confirmed that their parents did not request his parents to remove trees from our land.



12. Jotham Koech Ngeno, the Land Registrar, Bomet County testified as PW3 to the effect that he was aware of the suit property being No. Kericho/Silibwet/2972. That the land was registered in the name of Samuel Rono, Mariko Kiplangat Rono, Joseph Malakwen Rono and Sarah Chepkurui Koskei. That he had visited the land wherein he had found that the registered owners had not been using the land, instead it had been the Defendant who had been using the same. He also testified that the suit land had originated from parcel No. Kericho/Silibwet/806. He reiterated that Parcel No. 2972, belonged to the Plaintiffs but was being used by the Defendant and that Parcel No. Kericho/Silibwet/806 did not exist.
13. On cross examination by the Defendants Counsel, the witness confirmed that he was the Land Registrar Bomet and that he had been in that office for ten years. That he had visited the suit land once in the year 2015 to try and arbitrate over the dispute between the parties. He confirmed that the Defendant together with his brothers were in occupation of the suit land.
14. He also confirmed that the report he had prepared had been addressed to both the Plaintiffs and the Defendant and his brothers wherein he had informed them that the dispute, being a claim for land was not within his jurisdiction. The confirmed that after he had received the complaint, he had visited the suit land where he had found tree stumps which were as old as 30 years.
15. His evidence was that he did not know when parcel No. 806 had been subdivided although it could have been about 2 years ago and that the complaint had arisen after the subdivision. That whereas parcel No. 806 had been registered in the name of the Plaintiffs' father, parcel No. Kericho/Silibwet/800 was registered to the Defendant. That the Plaintiffs had based their claim on the Registry Index Map (RIM) which was not usually an authority to alter the situation on the ground because other factors such as existing trees, boundary marks, cultivation, houses etc. had to be taken into account.
16. In re- examination, the Land Registrar confirmed that the Registry Index Map (RIM) was not the final authority. That in demarcating land, they considered the age of the features on the ground including trees, fences houses. That the subdivision of land parcel No. 806 had been wrongly done and according to his findings, land parcel No. 2972 belonged to the Defendant He confirmed that P/exh 4 was correct. The Plaintiffs closed their case

Defence case

17. The Defendant, Stephen Kiplangat Mosonik then testified to the effect that he lived in Township Location, Bomet County and that it had not been true that he had trespassed onto the Plaintiffs' land. That indeed the 2nd and 3rd Plaintiffs had sold all their land in Bomet after which they had moved to Mau in Nakuru County in 2010. That save for the 1st Defendant (*sic*) who was still living on their ancestral land, the 2nd and 3rd Plaintiffs were not his neighbors in Bomet.
18. That the suit property had been purchased by his late father in the late 50s wherein he had been the born and bred. That his father, whose name was Eric Bargetet (deceased) was the registered owner of land parcel No. Kericho/Silibwet/800. That land parcel No Kericho/Silibwet/800 bordered with land parcel number Kericho/Silibwet/806 and further that land parcel No. 2972 had been recently registered in the names of the Plaintiffs although he had been using it for a long time.
19. He confirmed that the Land Registrar had visited the suit land in 2015 wherein he had established that there was a fence between parcel No. 800 and 806.
20. That he had not been given any land by his late father but that there was a Succession Cause, in respect of his late father's estate, still pending in Bomet High Court. That although he lived on parcel No. 800 with his 3 brothers namely Charles Mosonik, Philip Mosonik and Alfred Mosonik, yet the Plaintiffs had only instituted the suit against him.



21. That it was not true that he had entered the suit parcel of land in 2014 because the trees on the land had been planted by his father in 1982. He also testified that there had been trees that had sprouted from the trees that had been planted by his father, after they had harvested the same in 2013. He marked the copies of the photographs of the trees as DMFI 1(a-e).
22. In cross examination, the Defendant confirmed that he lived on parcel No. Kericho/Silibwet/800 whose registered owner was his late father Eric Bargetet. That the registered owners of land parcel No. Kericho/Silibwet/2972 were Samuel Rono, Malakwen Rono and Sarah Chepkurui. He also confirmed that before the suit land No. Kericho/Silibwet/2972 had been subdivided, his father had been in occupation and /or possession because it might have been registered as No. 800 but nobody was complaining.
23. That he did not know whether his father had any arrangement with the Plaintiff's father Arap Koskei. That he had sold the trees on parcel No. 2972 in May, 2013, which parcel of land had initially been fenced by Samwel Rono in 1982. That after they had sold the trees in 2013, they had asked the person who had bought them to repair the fence. He confirmed that he currently occupied parcel of land together with Charles Mosonik, Philip Mosonik and Alfred Mosonik and that the said land measured about 0.001 of an acre.
24. When the Defendant was re-examined, he reiterated that he alongside his three brothers were in occupation of the strip of land known as No. Kericho/Silibwet/2972 which land was cut off by the road. That there had never been any issue with the Plaintiff's late father who died in 2006. That further there had never been any complaint raised by the Plaintiff before his father died and further that the Plaintiff who was a Mason was their friend and they sometimes gave him masonry work to do for them.
25. He confirmed that on his own violation he had erected the fence in 1982, to prevent his cows from interfering with his neighbors. That his father had planted the trees in 1982 which trees had been cut in 2013 and although some of them fell on the fence, yet the fence had been repaired without any problem. He sought for the Plaintiffs' case to be dismissed with costs as the Plaintiff had no claim against him.
26. The second Defendant's witness, Charles Cheruiyot Mosonik testified that he came from Silibwet Sub-location Bomet County. That he knew Stephen Mosonik who was his younger brother. That he was the first born among his four brothers namely Stephen, Philip and Alfred all sons to Erick Barteget (deceased). That he also knew the Plaintiffs as sons and a daughter to Arap Koskei and their neighbors as they shared a common boundary. That whereas the Plaintiffs father's parcel of land was No. Kericho/Silibwet/806, theirs was No. 800. That the Defendants (*sic*) sub-divided their land and got new titles wherein Samwel still lived on his father's land but the other Defendants (*sic*) had moved away.
27. He testified that his brother had not trespassed on land parcel No. 2972 because that they had been in possession of that land since he was born in 1953, land which had been hived off from parcel No. 800. That upon return of his father in 1982, he had planted trees in memory of his retirement, on a thin strip of land which was between a road and a river.
28. That there was a boundary between parcel No. 806 and 800 and that Arap Koskei had never complained when their father planted the trees. That at the time their father died in 2010, Arap Koskei had died earlier, around 2005 but before his death, he had sub-divided his land among his sons, but left out the parcel where the trees were planted because he knew that those trees belonged to his (Defendant's) father.
29. He confirmed that they had not subdivided their land because they had not "done" succession. That the portion in dispute was occupied by his youngest brother Alfred and therefore he did not



- understand why the Defendants (*sic*) had sued his brother Stephen. That the Plaintiffs had never complained that the Defendant and his brothers were occupying their land until they (Defendant) had harvested the trees in 2013. That before that, their father had cut some trees and no one had complained. That although he couldn't remember when it had been erected, yet there had been a fence demarcating their land and the Plaintiff's land wherein the 1st Plaintiff had pulled it down in 2014 when he filed this case.
30. He testified that there was however a huge tree demarcating the two parcels of land. That the Plaintiffs had no valid claim against his brother, because each party had their own respective parcel of land, and at no time had the Plaintiffs used the parcel of land that they now lay claim to. The witness sought for the Plaintiffs' suit to be dismissed with costs.
 31. On cross examination the witness responded that No. Kericho/Silibwet/2972 was a subdivision of parcels No. 800 and 806. That according to the Registry Index Map, the boundary did not go beyond the road. That land parcel No. 800 has not been subdivided although Parcel No. 806 had been subdivided and title to No. 2972 obtained in the year 2011. He also stated that he was not aware that the Plaintiffs had conducted a Succession Cause. He confirmed that they had sold the trees that had been harvested from the strip No. 2972 and that although they did not have evidence that their father had planted the trees, yet they had witnesses to the same.
 32. When examined by the court, the witness confirmed that the trees were planted on parcel No. 2972 and that before that, there had been no fence although both their father and the Plaintiffs' father knew where the fence/boundary was.
 33. On the 23rd May 2018, the court went at the locus in quo alongside the surveyor, parties and their advocates to inspect the disputed portion wherein the court had directed the surveyor to file his report in court.
 34. On 27th February 2019, after the surveyor's report was filed in court, Samwel K Langat, the District Surveyor, Bomet testified as DW3 to the effect that based on the report dated 1st October 2018 which had been prepared after the court visited the site on 25th July 2018 and which he produced as Df exh 2, that the disputed area measured 0.045ha. That the parcels of land in dispute were Kericho/Silibwet/2972 and No. Kericho/Silibwet/800. That on the ground, the disputed area had been occupied by the owner of land parcel No. Kericho/Silibwet/800 for over 30 years. However, on the RIM, the disputed portion fell under parcel No. Kericho/ Silibwet/2972. That the Land Registrar had earlier on visited the suit land and the boundaries defining the two parcels were approximate. That RIM are not an authority on boundaries which meant that actual occupation took precedence to what subsisted on the ground. He confirmed that the Defendants were the ones in occupation and that the Plaintiffs had never been in occupation. That in such a scenario, the RIM ought to be amended to conform to what was on the ground.
 35. In cross examination, the surveyor responded that the land parcels in dispute were Kericho/Silibwet/2972 and Kericho/Silibwet/800. That the portion in dispute was parcel No. Kericho/Silibwet/2972 which portion was occupied by the Defendant. That they had received the information from the Defendant while at the site but he was not sure about the status of occupation. That the authority on boundaries was occupation and if one stayed on another's land for 12 years without being questioned, he could claim it by adverse possession subject to the court's direction.
 36. He also confirmed that although Land parcel No. 2972 was registered in the Plaintiffs' name in 2011, however, the real dispute related to Kericho/Silibwet/806 which land had belonged to Kiprono



Koskey, the Plaintiffs' father. He also confirmed that he did not know when Kiprono Koskey died and that he did not look at the first registration.

37. In re-examination, the surveyor was categorical that Parcel No. 2972 was derived from parcel No. 806 and that he had never handled any dispute between the owner of parcel No. 2972 and parcel No. 800. That the disputed portion was occupied by the Defendant and that if land parcel No. 2792 was registered on 13th July 2011, the Statute of Limitations did not apply. He also confirmed that he did not know if the surveyor who went to the ground had placed beacons at the time when parcel No. 2792 was created. That further whoever had gone to the ground must have used the RIM. That the Defendant had been in occupation even before parcel No. 2972 was registered.
38. As the matter was pending further defence hearing, on the 30th of April 2019, the court had been informed that the original 1st Plaintiff had passed away. The said 1st Plaintiff was then substituted with the current Plaintiff, by consent on the 4th July 2019 after which the matter remained un-prosecuted until 9th December 2021 when the court exercised its discretion and gave the Defendant a chance to redeem himself directing him to proceed with further hearing of his case without fail on the 2nd March 2022 and in default the defence case would stand automatically closed.
39. On the 2nd March 2022 when the matter came up for hearing, neither the Defendant nor his Counsel were present and upon the court being satisfied that they had been properly served, closed the defence case. Parties were then directed to file their written submissions but only the Plaintiff complied.

Plaintiffs' written submissions.

40. The Plaintiffs' submission is to the effect that on or about April 2014, the Defendant trespassed onto their parcel of land No. Kericho/Silibwet/2972 and planted trees thereon thus interfering with their quiet and peaceful occupation, use and enjoyment of the said land which measured approximately 0.07 hectares.
41. The Plaintiffs framed the issues for determination as follows;
 - i. Whether the Defendant trespassed onto the Plaintiff's parcel of land No. Kericho/Silibwet/2972.
 - ii. Whether the Plaintiffs are entitled to the reliefs sought.
 - iii. Who should bear costs of the suit.
42. The Plaintiffs submitted that the evidence adduced in court by three witnesses was to the effect that the 2nd Plaintiff was the registered proprietor of the suit land jointly with his siblings Mariko Rono (deceased), Samwel Rono (deceased), and Sarah Chekurui Kosgei as per the certificate of official search and green card produced as Pf exh 1 and 2 respectively. That the suit land was a resultant sub division of parcel No Kericho/Silibwet/806 which had bordered parcel No Kericho/ Silibwet/800 as per the Registry Index Map (RIM) produced as Pf exh 4.
43. That the Defendant's parcel of land No Kericho/Silibwet/800 did not extend to the river but ended by the road wherein parcel No Kericho/Silibwet/2972 was a tiny piece of land that bordered by road and the river just below parcel of land No Kericho/Silibwet/800.
44. That the suit land herein had been their grazing ground until the Defendant encroached on it. That indeed the Bomet County Land Registrar who had testified as PW 3 had confirmed that whereas the Plaintiffs were the registered proprietors of the suit land, yet the Defendant was in occupation thereof and this had been evidenced after his visit on the suit land on 22nd April 2015. This evidence was further



corroborated by the surveyor's report of 1st October 2018 herein produced as Df exh 2 to which he had made a finding that the disputed piece of land belonged to the Plaintiffs.

45. That the Defendant did not deny having trespassed on the Plaintiffs land but contended that the ownership of the land was by dint of his continued occupation and therefore it was the Plaintiffs submission that trespass continued.
46. That the Defendant did not adduce any documentary evidence of ownership and therefore backed by the decision in the case of *Ochako Obinchi vs Zachary Oyoti Nyamongo* In the Kisiii ELC No 28 of 2015, the Plaintiffs submitted that they had proved their case on a balance of probabilities that the Defendant had trespassed on their land by unlawfully planting trees thereon.
47. That having established that they were the registered proprietors of land parcel No. Kericho/Silibwet/2972, there ought to be a perpetual injunction issued against the Defendant restraining him, his agents and servants from interfering with the said parcel of land. That where there was a right there was a remedy. Further that having established ownership, there be issued costs for general damages against the Defendant for trespass.
48. That the Defendant had trespassed on their land, cut down the trees, fenced off the land and planted new trees thus depriving them of the occupation and use and enjoyment of their property. That the act of trespass having been proved, the Plaintiffs were entitled to damages whether or not they had suffered any loss. They sought for the cost of Ksh 200,000/= as damages for trespass considering the effluxion of time and inflation. That the Defendant's unlawful act of trespass had triggered the institution of the suit and therefore they should bear costs of the suit. They sought for the court to grant the prayers as sought in their Plaint.

Determination

49. I have considered the matter before me the evidence as well as the submission, the authorities and the applicable law. I find the undisputed facts of this case being that the Plaintiffs were the registered proprietors of the suit land No Kericho/ Silibwet/2972 having been registered as such on the 13th July 2011. It is also not in dispute that the suit land was a resultant sub division of parcel No Kericho/Silibwet/806 which had been registered to the Plaintiffs' father the late Mr. Arap Koskei.
50. It is further not in contention that bordering the said parcel of land was parcel No Kericho/Silibwet/800 which was registered to the Defendant's late father Mr. Eric Bargetet and that in 1982, the Defendant's father had planted some eucalyptus trees on a strip of land. It is also not in contention that during the lifetime of both the original proprietors, there had not been any dispute.
51. Subsequently, upon the death of the Plaintiffs' father in the year 2006, parcel No Kericho/Silibwet/806 had been subdivided giving rise to the disputed land herein No. Kericho/Silibwet/2972 which was a piece of land that bordered by road and the river just below parcel of land No Kericho/Silibwet/800. The said piece of land was then registered to the Plaintiffs on the 13th July 2011.
52. In the year 2013, after the Defendants cut down the trees that had been planted by their father and sold them, a dispute arose between them and the Defendant, whose father was now also deceased having died in the year 2010, whereby the Plaintiffs now lay claim on the parcel of land on which the trees had been planted and harvested. The dispute escalated to the Land Registrar's office who then visited the suit land. From the evidence adduced by both the Land Registrar, the Surveyor and the Defendant, it had emerged that indeed the land upon which the trees had been planted and upon which the Defendant was in occupation was land parcel No Kericho/Silibwet/2972 which was registered to the Plaintiffs.



53. It therefore clearly emerges that the two original holders of titles to parcels No. 806 and 800 that is to say the deceased Arap Koskei and Eric Bargetet lived harmoniously with each other wherein they did not quite know and/or understand the extent of the borders of their respective parcels of land but respected each other that way and assumed the portions they had been in occupation of was their respective portion of land such that there had been no complaint from Arap Koskei when Eric Bargetet planted the trees on his land. It is said that Arap Koskei and even left out the portion of land where the trees had been planted when he subdivided the land to his sons before his death.
54. It was only after the subdivision of parcel No Kericho/Silibwet/806 that it had emerged that Eric Bargetet had encroached on the same when he planted the trees. Despite evidence having been adduced that the Defendants had been in possession and/or occupation of the disputed portion of land for more than 30 years no suit had been filed for adverse possession and therefore when the disputed portion of land had been registered to the Plaintiffs on the 13th July 2011, the registration had removed the ambit of adverse possession from the Defendants as time started running on 13th July 2011. This suit having been filed on 16th July 2015, the stipulated period of 12 years under the law of limitations act had not lapsed.
55. When would time stop running" In *Joseph Gabumi Kiritu v Lawrence Munyambu Kabura* Civil Appeal No.20 of 1993, the court of Appeal held that;
- “Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. ...He must therefore make a peaceable and effective entry, or sue for recovery of land.”
56. Having established that that parcel No Kericho/Silibwet/2972 belonged to the Plaintiffs, the law is very clear on the protection of a holder of title as per the provisions of Section 26 (1) of the *Land Registration Act* of 2012 which provides as follows:-
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except;-
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.
57. The Defendant has not challenged the Plaintiffs’ title, but has confirmed that his being in possession and/or occupation of the suit land was by virtue of the fact that his late father Eric Bargetet had been in occupation of the said disputed parcel of land since the late 1950s, and had even planted trees there, land upon which he had been born and bred.
58. From both the oral and documentary the evidence adduced in court, it is quite clear that the Defendant herein although having been in possession and/or occupation of the disputed parcel of land which



was registered to the Plaintiff, had not acquired any proprietary rights to the same. The Plaintiffs have therefore sued the Defendant for being a trespasser and have sought for orders of injunction against the Defendant restraining him, his agents or servants from interfering with their quiet possession of parcel No. Kericho/Silibwet/2972. The Plaintiffs also seek general damages against the Defendant for trespass.

59. 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.”
60. 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.”
61. Indeed the Court of Appeal in the case of *Nguruman Limited vs Shompole Group Ranch & 3 Others* [2007] eKLR, while citing *Clerk and Lindsell on Torts* 16th Edition, paragraphs 23-01 held that :
- “Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.
62. In the case of *Isaack Ben Mulwa .vs. Jonathan Mutunga Mweke* [2016] eKLR, the Court of Appeal stated as follows in regard to a continuous trespass: -
- “Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be res – judicata simply because the same parties or their parents litigated over the same matter in 1985. It is well settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts.”
63. The Plaintiffs have alleged that the Defendant is still on the suit land and therefore the Defendant continues to commit fresh acts of trespass every time he continues being on the suit land. Time therefore begins to run afresh as long as the Defendant is still on the suit property, and therefore the statute of limitation does not apply in the present scenario. It is trite law that continuous injuries to land create separate actions.
64. In this case, the Defendant having been in continued possession of the suit land, the Plaintiffs were entitled to claim remedy to give effect to their right as registered proprietors of the suit land.
65. Winfield and Jolowicz state in their book “*Tort*” (12th Edition @ p. 361) as follows;
- “Possession in fact confers no actual right of property, but a possessor may nevertheless maintain trespass against anyone who interferes who himself cannot show that he has the right to recover possession immediately. A stranger cannot rely in his defence upon another person’s right to possess (the “jus tertii”) unless he can prove that he acted with that person’s authority. Even wrongful possession, such as that acquired by a squatter, will, in principle, be protected except against the owner of the land or someone acting lawfully on his behalf.”



66. Hon Lady Justice J.G. Kemei in *John Kiragu Kimani vs Rural Electrification Authority* [2018] eKLR while 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’.

67. From the holding herein above and the definition of trespass, the court finds that indeed the Defendants’ action of remaining on the suit land despite demand notice to vacate constitute trespass. Once trespass to land is established, it is actionable *per se* and indeed no proof of damage is necessary. See *Park Towers Ltd V John Mithamo Njika & 7 Others* [2014]eKLR.

68. The Plaintiffs have sought for a permanent injunction to issue against the Defendant. In the case in *Kenya Power & Lighting Co. Ltd -vs- Sheriff Molana Habib* (2018) eKLR the court had held that :-

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected”

69. The summation of my finding is that the Plaintiffs have proved their case against the Defendant to the effect he has settled on their suit property without any legal claim or title, I therefore enter judgment in their favor as follows;

- i. A declaration is hereby issued that the Plaintiffs are the absolute legal owners of Land reference No. parcel No Kericho/Silibwet/2972.
- ii. There be and is hereby issued a perpetual injunction restraining the Defendant, his agents or servants from interfering with No. parcel No Kericho/Silibwet/2972.
- iii. The Defendants to pay general damages for trespass at Ksh 100,000/=
- iv. Cost of the suit
- v. Interest on (iii) above at Court rates from the date of filing suit till payment in full.

It is ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 16TH DAY OF JUNE 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

