



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Marwa v Mahegere & 5 others (Environment & Land Case 10 of 2013)  
[2022] KEELC 14629 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14629 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 10 OF 2013  
MN KULLOW, J  
OCTOBER 19, 2022  
(FORMERLY KISII ELC CASE NO. 10 OF 2013)**

**BETWEEN**

**JOEL MAKENGE MARWA ..... PLAINTIFF**

**AND**

**DINA MAHEGERE ..... 1<sup>ST</sup> DEFENDANT**

**DAVID MAHEGERE ..... 2<sup>ND</sup> DEFENDANT**

**MATINDE JAMES MWITA ..... 3<sup>RD</sup> DEFENDANT**

**NCHAMA SIMEON MAHEGERE ..... 4<sup>TH</sup> DEFENDANT**

**ROBI JAMES ..... 5<sup>TH</sup> DEFENDANT**

**JAMES MWITA MAHEGERE ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit vide a Plaint dated January 7, 2013; seeking the following Orders against the defendants: -
  - i. A Declaration that the defendants' acts of invading and trespassing into land parcel No. Nyabasi/ Busonga/ 325 are unlawful.
  - ii. An eviction order against the defendants.
  - iii. Mesne profit of Ksh. 5,000/= per month.
  - iv. A Permanent Injunction restraining the defendants, by themselves, their servants, agents, family members or anybody under their direction from entering and interfering with land parcel No. Nyabasi/ Busonga/ 325 in any manner whatsoever.



- v. Costs of the suit.
2. The plaintiff contends that he is the registered owner of all that suit parcel of land No. Nyabasi/ Busonga/ 325, having purchased the same from one Charles Monanka Marwa.
  3. He contends that prior to him purchasing the said parcel from Charles Monanka Marwa and even after the transfer of the said parcel to his name; the defendants have unlawfully and without any justifiable reason trespassed on the said land and continue to trespass despite having their own parcel of land and have even erected semi- permanent structures thereon.
  4. The defendants filed a Memorandum of Appearance dated February 21, 2013 through the firm of M/ S Nyagesoa & Co. Advocates and filed a Joint Statement of Defence dated March 11, 2015; denying all the averments contained in the plaint in toto. The defendants dismissed the Plaintiff's claim as being misconceived, frivolous, legally untenable, made in bad faith and further that the plaint did not disclose any reasonable cause of action against them and urged the court to dismiss the same.
  5. They maintained that they have never unlawfully trespassed and/or entered into the plaintiff's land parcel as alleged and therefore the said allegations of trespass are all false.
  6. In the alternative and without prejudice to the foregoing, it was the defendants contention that the instant suit is an afterthought; the same having been filed after they had filed and served the plaintiff with summons in respect to Kisii High Court Case No. 549 of 2012 (O.S), seeking adverse possession of the suit property having been in possession and occupation thereof for a period of over 12 years. It is their claim that they filed an earlier suit against the plaintiff over the same subject matter which is still pending in court and therefore urged the court to strike out the plaintiff's suit.
  7. They further deposed that the sale of the suit land and subsequent transfer was unlawful hence null and void. It is their position that they have been in continuous and uninterrupted occupation of the suit parcel for a period of over 12 years and have thus acquired title to the said land.

### **Trial**

8. On 27/3/2019; the matter proceeded for the hearing of the plaintiff's case. Plaintiff testified as PW1, he adopted his witness statement dated 7/1/2012 as his testimony in chief. It was also his testimony that he bought the suit property from Charles Marwa and a title deed was issued to that effect after following the due process of obtaining the Letter of Consent from the Land Control Board, transfer and subsequent registration on October 5, 2012.
9. It was also his claim that he conducted his due diligence prior to purchasing the suit parcel and was further informed by the seller that the defendants would vacate the suit property since they had their own separate land No. 414. He stated that he has been unable to access or utilize the land due to the hostility exhibited by the Defendants. It is his contention, that the defendants are misleading the court that they are beneficiaries of the estate of the deceased and urged the court to treat the defendants as trespassers.
10. He further produced the documents in his List of Documents dated December 7, 2013 and Supplementary List of Document dated March 25, 2019 as exhibits in support of his case as follows;
  - i. A copy of the Chief's letter dated October 5, 2012– PExhibit 1
  - ii. Title Deed – PExhibit 2
  - iii. Demand Notice dated August 27, 2012– PExhibit 3



- iv. Confirmed Grant of Letters of Administration dated March 4, 2010 – PExhibit 4
  - v. Official Search for Nyabasi/ Busonga/414 – PExhibit 5
  - vi. Death Certificate for Robi Marwa Kebondari – PExhibit 6
  - vii. Letter of Land Control Board Consent dated July 10, 2012– PExhibit 7
  - viii. Transfer dated October 3, 2012– PExhibit 8
11. On cross- examination he stated that at the time of buying the land, he found 4-5 homesteads, though the structures were temporary made of mud and corrugated iron sheet roofs but the seller Charles Marwa assured him that the defendants were temporarily on the suit land.
  12. Charles Monanka Marwa testified as PW2; he adopted his witness statement dated 25/3/2019 as his evidence in chief. She further stated that he was the only heir to Robi Marwa who passed away in the year 2000. He obtained grant of letters of administration in respect to her estate and later sold the said land to PW1 on 3/10/2012.
  13. He further dismissed the assertions by the defendants that they have lived on the suit land for 45 years and stated that his deceased mother invited and allowed the defendants into the suit land in the year 2000. That the defendants started erecting structures in the year 2001 and upon obtaining the grant of representation, he asked them to vacate the property in the year 2012 and even reported them to the area chief.
  14. On cross-examination; he reiterated that his late mother invited the defendants into the suit land in the year 2000. It was his contention that the defendants started building structures on the land in the year 2011. he maintained that her late mother allowed and/consented to the defendants’ use of the suit property.
  15. Joseph Gekura, the Area Chief testified as PW3; he stated that the suit parcel No. 325 belonged to Robi Marwa who is since deceased and the same was inherited by Charles Marwa by way of succession and thus became the registered owner of the said parcel. That the suit parcel No. 325 borders parcel No. 414 which belongs to the defendant’s father one Mahegere Kibodari alias Samson Mahegere and the PW2’s uncle.
  16. He further stated that after the death of Robi Marwa, the defendants invaded the parcel No. 325. The dispute was taken to him in his capacity as the chief to try and resolve the dispute and he prepared a letter dated 30/08/2004 as produced as PExhibit 6.
  17. The plaintiff thereafter closed their case.
  18. The defence case was scheduled for 4/02/2022; however, on the said date, neither the Defendants nor their advocates on record attended court as scheduled and no reasonable cause, justification/ explanation was given for their absence. Consequently, the Defence case was closed and directions were issued on the filing of the final submissions.
  19. Unfortunately, Only the plaintiff filed his written submissions together with authorities which I have read and taken into consideration. Be that as it may, I will proceed with my judgment as hereunder;

### **Analysis and Disposition**

20. It is this court’s considered view that the main issue arising for determination is whether the plaintiff is entitled to the Reliefs sought in the plaint dated January 7, 2013 on account of: -



- a. Ownership of the suit parcel L.R. No. Nyabasi/Busonga/325
- b. Trespass and/or encroachment into parcel the suit parcel by the defendants.
- c. Reliefs sought of Permanent Injunction, mesne profit and eviction orders.
- d. Costs of the suit.

### **Ownership of the suit land**

21. Section 26 (1) of the [Land Registration Act](#) provides that the Certificate of Title shall be held as conclusive evidence of proprietorship and states as follows: -
  - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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.
22. The plaintiff contends that that he is the absolute owner of the suit property having purchased the same from Charles Marwa who testified as PW2 during trial. His claim is grounded upon the possession of a Title Deed of the suit property No. 325 duly registered in his name. He produced a copy of the title as Pexh 2 to prove his ownership claims. It is important to note that the said evidence was not challenged and/ uncontroverted by the defendants
23. The defendants on the other hand maintained that they are the rightful owners of the suit parcel having lived on the said land for about 36-54 years, they have built their homes thereon and have been cultivating the said land over the years. It is their contention that as a result of the said occupation, they had attained rights and interest over the suit land which are adverse to the plaintiff's rights over the same land.
24. The Act under section 26 subsection 1 (a & b) stated above, provides instances when a title can be challenged and the said provisions cannot be sidestepped by averments/ allegations that have not been backed up by any evidence and/or sufficient basis.
25. From the evidence adduced by the plaintiff; Pexh 4,6,7 & 8 gives a reflection that the creation of the plaintiff's title was in accordance with the applicable law and to this extent I find that the plaintiff's title deed Pexh 2 is absolute and indefeasible and further that the same is a prima facie conclusive proof of ownership of the land.
26. With regards to the defendants' claim on adverse possession; the defendants did not attend court during trial to demonstrate their assertions nor produced any documents as exhibits in support of their claim. It is now well established that adverse possession is a hostile takeover and the onus is on the applicant to prove and demonstrate that he has acquired rights and overriding interests over the suit property which are adverse to the rights of the registered owner.



27. Long possession is not necessarily adverse possession; it cannot be assumed as a matter of law from the mere exclusive and long possession even if the said possession has been for 12 years or however long continued.
28. In view of the foregoing, I find that upon registration of the Plaintiff as the absolute owner of the suit parcel, he became entitled to all the rights conferred by registration as guaranteed under section 24 (a) of the [Land Registration Act](#) including the right to occupation and use to the exclusion of all others. It is therefore my finding that the Plaintiff is the absolute registered owner of the suit property; L.R. No. Nyabasi/ Busonga/325.

### **Trespass**

29. Section 3 (1) of the [Trespass Act](#), cap 294 provides that:

“ 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.”
30. In order to establish the tort of trespass, the plaintiff must prove his title to the suit property and demonstrate that the defendants have entered and occupied the suit property without any justifiable cause.
31. Having held that the plaintiff is the absolute owner of the suit property and further that the defendants did not prove their claim on adverse possession; it follows therefore that the defendants’ continued occupation and refusal to vacate the suit land amounts to trespass and/or encroachment.
32. It was the testimony of PW2 that upon attaining the requisite confirmed grant of representation and the subsequent registration of the suit land in his name by transmission; he sold the suit land to the plaintiff. He further stated that he asked the Defendants to vacate the suit land and give possession thereof to the plaintiff and when they refused, he reported the complaint to the area Chief- PW3. PW3 also confirmed the same averments and produced Pexh 1 as proof of the said complaint between Charles Marwa and the defendants.
33. I therefore find that the defendants’ continued occupation even after being informed that the suit land had since been sold and being asked to vacate the same; the refusal thereof and continued occupation amounts to trespass.

### **Permanent Injunction**

34. Permanent injunctions are perpetual in nature; they are meant to perpetually restrain a party from committing an act. The plaintiff has urged the court to restrain the defendants and anybody claiming under them from entering and interfering with the suit parcel No. 325 in any manner whatsoever. See [Kenya Power & Lighting Co Ltd v Sheriff Molana Habib](#) (2018) eKLR
35. Based on the evidence presented before this court; I find that there is need to restrain the defendants from interfering with the suit land and the plaintiff’s possession, use and occupation for the reason that no sufficient justification and basis has been advanced by the defendants to warrant their continued occupation and use of the suit land. To this end, I find that there is need to grant the order of permanent injunction as sought.



## Mesne Profits

36. Section 2 of the *Civil Procedure Act* cap 21 of the Laws of Kenya defines mesne profits as follows: -

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

37. The Court of Appeal in the case of *Peter Mwangi Mbutia & another v Samow Edin Osman* [2014] eKLR was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows: -

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

38. Further, Nyamweya J in the case of *Karanja Mbugua & another v Marybin Holding Co. Ltd* [2014] eKLR stated as follows with regard to mesne profits: -

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of Civil Procedure Act.....”

39. The plaintiff has not adduced any evidence/ proof for the basis and/ or justification of the Kshs. 5,000/ = per month demanded as mesne profit. Guided by the aforementioned case laws, it is my humble opinion that in the absence of any evidence to support the award of Kshs. 5,000/- per month mesne profit sought, this court to unable to award the same.

## Costs

40. It is trite law that costs generally follow the event and in this case, the plaintiff having proven his case to the required threshold, I find that he is entitled to costs of the suit.

## Conclusion

41. In the premises, I find that plaintiff has partly proven his case to the required standard and I therefore partly allow the Plaint dated January 7, 2013 on the following terms: -

- i. A Declaration is hereby made that the acts of the defendants' acts of invading into land parcel No. Nyabasi/ Busonga/ 325 amounts to trespass and is therefore unlawful.
- ii. The defendants are hereby ordered to vacate the suit property L.R. No. No. Nyabasi/ Busonga/ 325 within 60 days from the date of this Judgment.
- iii. An Order of Permanent Injunction is hereby issued restraining the defendants, by themselves, their servants, agents, family members or anybody under their direction from entering and interfering with land parcel No. Nyabasi/ Busonga/ 325 in any manner whatsoever.
- iv. Costs of the suit to be borne by the defendants.
- v. Any eviction must comply with the statutory provisions of law.



It is so Ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 19<sup>TH</sup> DAY OF OCTOBER, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

In presence of; -

Non-Appearance for the Plaintiff

Non-Appearance for the Defendant

Tom Maurice – Court Assistant

