



**Abwalaba v Ochieng (Environment and Land Case 12 of 2021)  
[2025] KEELC 5077 (KLR) (7 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5077 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND CASE 12 OF 2021**

**DO OHUNGO, J**

**JULY 7, 2025**

**BETWEEN**

**ARNOLD ANDABWA ABWALABA ..... PLAINTIFF**

**AND**

**BENARD WESONGA OCHIENG ..... DEFENDANT**

**JUDGMENT**

1. Proceedings in this matter commenced on 27<sup>th</sup> October 2021 when the Plaintiff filed Plaintiff dated the same date. That initial Plaintiff was replaced by Amended Plaintiff amended on 9<sup>th</sup> November 2021. The averred in the Amended Plaintiff that he was the registered proprietor of the parcel of land known as Kakamega/Municipality/Block 2/291 (the suit property) and that the Defendant had encroached onto the suit property and put it to his own use thereby occasioning him great loss and damage. He further averred that efforts to have the Defendant vacate peacefully had been met with hostility.
2. The Plaintiff therefore prayed for judgment against the Defendant for:
  - a. An eviction order against the defendant from land parcel No. Kakamega/Municipality/Block 2/291.
  - b. An order of permanent injunction restraining the defendant, his agents, servants, employees ar (sic) anybody claiming through him from trespassing, laying claim or in any way interfering with the plaintiff's land parcel No. Kakamega/Municipality/Block 2/291.
  - c. Mesne profit at the rate of Kshs. 800,000/= per year.
  - d. Costs of the suit.
  - e. Any other relief this honourable court deems fit to grant.



3. The Defendant filed statement of defence dated 7<sup>th</sup> December 2021 through which he denied the Plaintiff's allegations and averred that he was the registered proprietor of a parcel of land known as Kakamega/Municipality Block II/291 and in exclusive possession thereof since the year 2009. He further averred that the suit property was non-existent and urged the Court to dismiss the Plaintiff's case with costs.
4. The Plaintiff testified as (PW1) and adopted his witness statement dated 27<sup>th</sup> October 2021. He reiterated therein that he was the registered proprietor of the parcel of the suit property and that the Defendant had encroached thereon on 24<sup>th</sup> March 2021, fenced it off and put it to his own use thereby occasioning him great loss and damage. He added that the Defendant was in possession and had leased out the property. He produced copies of the documents listed as items numbers 1 to 14 in his list of documents dated 27<sup>th</sup> October 2021 (PExb 1 to 14 respectively) and a copy of the only item in his further list of documents dated 30<sup>th</sup> June 2022 (PMFI15).
5. Under cross-examination and re-examination, he stated that upon being allocated the suit property, he was given a map in which the property was captured as "Block II/291." That the plot had been surveyed on 16<sup>th</sup> May 1994, prior to allocation to him. He further stated that he paid the sums listed in the letter of allotment on 23<sup>rd</sup> July 2020 which was 25 years after the allotment and that when he tried to charge the property in favour of a bank to secure a loan, the Land Registrar rejected the charge and informed him that the defendant had another title. Additionally, he testified that in the year 2019 when the County Government of Kakamega wanted to repossess plots which had not been developed, he was summoned and attended a meeting to explain why he had not developed the suit property.
6. Ojwang Omollo Patroba (PW2), an Assistant Director of Land Administration in the Ministry of Lands stated that his office wrote a letter dated 23<sup>rd</sup> June 2022 to Nandwa & Company Advocates in which they confirmed that the suit property belongs to the Plaintiff. He produced a copy of the said letter which had earlier been marked PMFI15 as PExb15 and went on to state that his office was aware of a dispute between the Plaintiff and the Defendant and that his office conducted investigations which revealed that the Plaintiff is the owner of the suit property. He added that the Defendant is a stranger to his office and that according to correspondence file in his office, the plot number is Kakamega Municipality Block 2/291 and not Kakamega/Municipality Block II/291. That according to his office, "Block 2/291" and "Block II/291" refer to one and the same plot.
7. The Plaintiffs' case was then closed.
8. The Defendant testified as DW1 and adopted his witness statement dated 7<sup>th</sup> December 2021 in which he stated that he was the registered proprietor of parcel number Kakamega/Municipality Block II/291 which he purchased from one Julius Aldrin Juma on 30<sup>th</sup> April 2009. That Julius Aldrin Juma had a Certificate of Lease in his name and that prior to the purchase, he conducted due diligence which confirmed that Julius Aldrin Juma was the proprietor and that there were no encumbrances. He added that he fenced off the property and had exclusive possession from the date of the purchase.
9. The Defendant further testified that being aware of land grabbers who process fake titles in Kakamega County and forcibly take over properties registered in other citizens' names, he conducted searches at the land registry in the years 2011, 2012 and 2013 all of which affirmed that he was the proprietor. That when his caretaker saw unknown persons in the property in May 2021, he obtained a green card which showed that he was the proprietor. The Defendant produced copies of the documents listed as items numbers 1 to 7 in his list of documents dated 7<sup>th</sup> December 2021 (DExb 1 to 7 respectively), copies of the documents listed as items numbers 1 and 2 in his supplementary list of documents dated 3<sup>rd</sup> March 2022 (DExb 8 and 9 respectively), and copies of the documents listed as items numbers 1 and 2 in his



further list of documents dated 19<sup>th</sup> March 2022 (DEXb 10 and 11 respectively). The Defendant further testified that when he purchased the parcel from Julius Aldrin Juma, the said vendor showed him a certificate of lease and that the property was undeveloped at that time. He added that the property was listed by the County Government for repossession and that he defended it from repossession.

10. Defence case was then closed. Thereafter, directions for filing and exchange of written submissions were issued. The Plaintiff filed submissions dated 21<sup>st</sup> November 2024 while the Defendant filed submissions dated 5<sup>th</sup> March 2025.
11. I have considered the pleadings, evidence and submissions. The issues that emerge for determination are whether encroachment or trespass on Kakamega/Municipality/Block 2/291 has been established and whether the reliefs sought are available.
12. The Plaintiff's case is that the Defendant encroached on or trespassed on Kakamega/Municipality/Block 2/291. Trespass is defined in the 10<sup>th</sup> 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.
13. In Charles Ogejo Ochieng vs. Geoffrey Okumu [1995] KECA 169 KLR, the Court of Appeal described trespass thus:

Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. See Halsbury's Laws of England 3rd edition Volume 38 at pg 744.

14. To succeed in his allegations of trespass, the Plaintiff must prove proprietorship of the property in dispute. The Plaintiff's case is that he is the registered proprietor of parcel number Kakamega/Municipality/Block 2/291. A perusal of the copies of the Certificate of Lease as well as the lease which the Plaintiff produced shows that the correct parcel number as specified in the said documents is Kakamega/Municipality Block 2/291 and that the Plaintiff was registered as proprietor thereof on 2<sup>nd</sup> March 2021.
15. According to the Plaintiff, his registration as proprietor was preceded by a letter of allotment being issued to him on 10<sup>th</sup> January 1995. A perusal of the said letter reveals that the Plaintiff was required to accept the offer and pay the sum of KShs 12,660 specified therein within thirty days from the date of the letter. The letter specifically stated that the offer would be considered to have lapsed if acceptance and payment were not received within the stated period. Notwithstanding the said condition, the Plaintiff testified that he made the payment on 23<sup>rd</sup> July 2020 which was 25 years after the allotment. The lease and certificate of lease were thereafter issued to him.
16. The Plaintiff has contended that the Defendant trespassed on parcel number Kakamega/Municipality Block 2/291 on 24<sup>th</sup> March 2021, fenced it off and put it to his own use. On the other hand, the Defendant's position is that parcel number Kakamega/Municipality Block 2/291 or Kakamega/Municipality/Block 2/291 as the Plaintiff has referred to it in his pleadings does not exist. Instead, what exists according to the Defendant is parcel number Kakamega/Municipality Block II/291. The Defendant contends that he is the registered proprietor of Kakamega/Municipality Block II/291 and that he has been in exclusive possession thereof since the year 2009.
17. I have perused the documents that the Defendant produced which include copies of a Certificate of Lease, various Certificates of Official Search whose dates range from 3<sup>rd</sup> April 2009 to 13<sup>th</sup> September 2013 and a copy of the register in respect of Kakamega/Municipality Block II/291 certified by the Land



Registrar on 5<sup>th</sup> May 2021. The said documents state that the Defendant was registered as proprietor of Kakamega/Municipality Block II/291 on 12<sup>th</sup> June 2009 and Certificate of Lease issued to him on the said date. Prior to that, Julius Aldrin Juma was the registered proprietor from 4<sup>th</sup> July 2002. A Certificate of Lease was issued to Julius Aldrin Juma on 4<sup>th</sup> July 2002.

18. In effect therefore, the Court is confronted with two certificates of title. The rights of a registered proprietor of land are well articulated in law. Such a proprietor is entitled to the rights, privileges, and benefits spelt out at Article 40 of *the Constitution* which secures protection of right to property and Sections 24 and 26 of the *Land Registration Act*.

19. Section 24 of the *Land Registration Act* provides as follows:

Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

20. Section 26 (1) of the *Land Registration Act* provides as follows:

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.

21. None of the parties has pleaded a case for the nullification of any of the titles. As has been severally held by the Courts, parties are bound by their pleadings. The Court too is in a sense bound by the parties' pleadings since pleadings circumscribe the issues for determination and reliefs sought. See Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR. Thus, this Court cannot in the absence of a specific prayer to that effect, nullify or cancel any of the titles.

22. The Plaintiff has not specifically pleaded any case that the parcel which he refers to as Kakamega/Municipality Block 2/291 or Kakamega/Municipality/Block 2/291 is one and the same one as what the Defendant is referring to as Kakamega/Municipality Block II/291. I am aware that the Plaintiff has contended that the Defendant fenced off Kakamega/Municipality/Block 2/291 on 24<sup>th</sup> March 2021 and put it to his own use. I am also alive to the testimony of PW2 that Kakamega/Municipality Block 2/291 and Kakamega/Municipality Block II/291 refer to one and the same parcel.



23. PW2 is an Assistant Director of Land Administration and not a Land Registrar. On matters of identification and description of registered parcels of land, PW2's word is not final. Despite PW2's position, the Defendant produced a copy of the register in respect of Kakamega/Municipality Block II/291 certified by the Land Registrar Kakamega on 5<sup>th</sup> May 2021 which states emphatically that the Defendant is the registered proprietor of Kakamega/Municipality Block II/291, having been registered as such on 12<sup>th</sup> June 2009. If indeed the two parcel numbers refer to one and the same plot on the ground, how could the Land Registrar Kakamega certify the Defendant as proprietor of the plot on 5<sup>th</sup> May 2021, yet the same Land Registrar issued a Certificate of Lease in respect of the same plot to the Plaintiff two months earlier on 2<sup>nd</sup> March 2021? How is this Court expected to disregard the Defendant's title which predates the Plaintiff's title?
24. It is clear to me that at the heart of the dispute between the parties is the question of validity of the respective titles as opposed to trespass or encroachment. In the absence of proof of ownership, there cannot be proof of trespass. Having gone through pre-trial proceedings, the parties were aware of each other's title and that the conflict is over the same parcel on the ground. If they really wanted to resolve the dispute, they would have addressed validity of the titles. To conclusively address trespass, survey evidence ought to have additionally been tendered identifying the respective parcels and their location on the ground. If both occupy the same position on the ground, that should be brought out through expert survey evidence as opposed to the testimony of parties who are laymen on survey matters.
25. The upshot of the foregoing is that encroachment or trespass by the Defendant on Kakamega/Municipality/Block 2/291 or Kakamega/Municipality Block 2/291 has not been established. It follows therefore that the reliefs sought by the Plaintiff are not available.
26. I find no merit in the Plaintiff's case, and I therefore dismiss it. Considering the circumstances of the dispute, each party shall bear own costs.

**DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 7<sup>TH</sup> DAY OF JULY 2025.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Ms Olucheli for the Plaintiff

Ms Maruti holding brief for Mr Chenge for the Defendant

Court Assistant: B Kerubo

