



REPUBLIC OF KENYA



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**Namisi v Ndubi & another (Environment & Land Case  
E022 of 2022) [2025] KEELC 4987 (KLR) (2 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 4987 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE E022 OF 2022**

**CK NZILI, J**

**JULY 2, 2025**

**BETWEEN**

**PENROSE N NAMISI ..... PLAINTIFF**

**AND**

**DUNCAN DAUDI NDUBI ..... 1<sup>ST</sup> DEFENDANT**

**LUKORITO WANAMATTI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff approached this court by an amended plaint dated 4/4/2024. The prayers sought are:
  - (a) Declaration that the defendants are trespassers who should be evicted from occupation of her 20 acres out of I.R 7682 Simuli Trend Farm situate at Saboti-Koikoi.
  - (b) Mesne profits at the rate of Kshs.194,166 per acre, totaling Kshs.2,330,000/=.
2. The plaintiff as the registered owner of the farm avers that he allowed the 1<sup>st</sup> defendant, who is her son, to plant maize on her farm to sustain himself in 2021, only to abuse the privilege accorded to him by secretly and illegally leasing the same to the 2<sup>nd</sup> defendant in 2021 and 2022, without her knowledge, approval, consent or authority. The plaintiff termed the acts of the 2<sup>nd</sup> defendant of entering into, occupying, planting and possessing the suit land for the said period as amounting to trespass and denying her use and income of the land.
3. The 2<sup>nd</sup> defendant opposed the claim through an amended defence dated 11/4/2024. He denied invading the suit land as alleged or at all; otherwise, there was a valid lease from the 1<sup>st</sup> defendant, who held a lifetime interest in the estate of the late George Ndubi, the husband of the plaintiff. The 2<sup>nd</sup> defendant denied receiving any summons from the area OCS for an alleged trespass.
4. At the trial, Penrose N. Namisi testified as PW1. She relied on a witness statement dated 22/8/2022 as her evidence-in-chief. She told the court that after she got married to the late George Ndubi, they



- acquired and registered I.R No. 17862/1 in early 1991, measuring 38 acres from Elizabeth Dalton at Kshs.600,000/=, as joint proprietors. PW1 stated that they continued utilizing the land until her husband passed on, on 5/5/2021, following which she transferred the land under her name. PW1 said that she allowed the 1<sup>st</sup> defendant to plant seed maize only to learn in early 2022 that he 1<sup>st</sup> defendant had allegedly leased out the 20 acres he was tilling to the 2<sup>nd</sup> defendant, without her knowledge, consent or approval.
5. Again, PW1 stated the court that he approached the 2<sup>nd</sup> defendant, who initially denied the same, yet upon visiting the suit land on 2/7/2022, one Kiplimo Arnold had been hired as a watchman and was on the land. Later on, PW1 said that she wrote a demand letter to the 2<sup>nd</sup> defendant, who refused to stop his actions on the suit land.
  6. PW1 told the court that the 2<sup>nd</sup> defendant was even summoned by the OCS Saboti to his office, but refused to attend. PW1 asked the court to grant her the reliefs sought; otherwise, she had suffered loss and damage in terms of rental income, currently at Kshs.194,166/= per acre, as is the case with PW2, who has leased out the land from her.
  7. Similarly, PW1 relied on a copy of a certificate of title showing her joint ownership with effect from 12/3/1991 as P. Exhibit No. 1), an abstract from police records as P. Exhibit No. 2, an affidavit sworn on 20/5/2021 as P. Exhibit No. 3, a certificate of death as P. Exhibit No. 4, copy of photograph as P. Exhibit No. 5, a demand letter dated 31/5/2022 as P. Exhibit No. 6, an email dated 3/6/2022 as P. Exhibit No. 7(a) and (b), and lastly; a response to the demand letter from the 2<sup>nd</sup> defendant, advocates on record as P. Exhibit 7(c).
  8. In cross-examination, PW1 told the court that she was not privy to the entry through a lease by the 2<sup>nd</sup> defendant and the planting of seed maize on her land by the 2<sup>nd</sup> defendant, at the instance of her son, otherwise, as the bona fide owner, she was entitled to damage for the trespass since she had not consented to the lease. PW1 told the court that she had warned the 2<sup>nd</sup> defendant that the land was hers, but all in vain.
  9. In addition, PW1 testified that the 1<sup>st</sup> defendant had abused the privilege accorded to him to cultivate, solely use the land, but not to lease it out without her consent to third parties. PW1 told the court that the 1<sup>st</sup> defendant overstepped his limited privilege in transacting with the 2<sup>nd</sup> defendant without consulting her. Equally, PW1 told the court that the 2<sup>nd</sup> defendant undertook no due diligence before entering into the lease with her son; otherwise, he would have established that the land solely belonged to her after the death of the late husband. PW1 said that she was denied use, occupation and income from the suit land for one year.
  10. PW1 added that her mesne profits of Kshs.2,331,000/= are based on the then prevailing rates for leasing an acre of land. PW1 told the court that she was intending for her son to take over the family business after the death of his father, only for him to abuse the privilege. PW1 said that her claim is based on 12 acres. She said that she became aware of the lease after the Kenya Seed Co. Ltd shared with her the lease documents after the demand letter was served upon the 2<sup>nd</sup> defendant.
  11. Paul Nyamondi Odenyo testified as PW2. He relied on a witness statement dated 4/3/2024 as his evidence-in-chief. He produced the Kenya Seed Weigh Bridge Results and the growers' statement printouts as P. Exhibit Nos. 8 and 9. PW2 contended that he had worked with Kenya Seed Co. Ltd for 6 years and was therefore conversant with seed maize growing arrangements.
  12. PW2 told the court that according to the financial statement, he was able to deliver maize worth Kshs.3,100,000/= from the 12 acres of land he had leased from the plaintiff in 2022/2023.



13. Robert Wanamatiti testified as DW1. He relied on a witness statement dated 28/9/2022 as his evidence-in-chief. DW1 stated that he was aware that the 1<sup>st</sup> defendant was the plaintiff's son. DW1 said that in January 2022, the 1<sup>st</sup> defendant offered to lease out 13 acres of the suit land for one year, whereof he paid him Kshs.230,000/=, by way of a bank deposit. DW1 said that he was to lease the land for only the agreed-upon purposes, by planting maize crops, which, upon maturity and harvest, would cause his lease to expire. DW1 said that the suit had therefore been overtaken by the event.
14. Further, DW1 insisted that he leased out the land from the 1<sup>st</sup> defendant since he knew that he had a beneficial interest in the portion, hence did not doubt his capacity to enter into the lease agreement. DW1 relied on a copy of the lease dated 17/1/2022, banking slip, letter dated 23/3/2024 and contract agreement with the Kenya Seed Co. Ltd for the period 2011 - 2025 as D. Exhibit Nos. 1-4, respectively.
15. DW1 told the court that the 1<sup>st</sup> defendant was living in his parents residence on the suit land, where he entered into the lease agreement; otherwise, before 17/1/2022, he had assisted him in tilling the land, until he incurred a loss in 2021.
16. DW1 said that before the late George Ndubi passed on, he used to assist him with ploughing the suit land, where he was also supplying seed maize to Kenya Seed Co. Ltd since 2000, alongside his other wife, Nancy Thuo. DW1 confirmed that after his leave expired, PW2 was the one on the land. DW1 told the court that he was on the land for about 6 months when this suit was filed
17. In cross-examination, DW1 told the court that it was his son Peter, who had been contracted by Kenya Seed Co. Ltd to plant seed maize. DW1 admitted receiving and sending the emails from the 1<sup>st</sup> defendant in 2021. DW1 said that he was not aware that the suit land after the 1<sup>st</sup> defendant's father passed on, exclusively belonged to the plaintiff as per P. Exhibit No. (1) Additionally, DW1 said that he was not aware that the lawyer who prepared and witnessed the lease agreement had been struck off the Roll of Advocates by 2021.
18. DW1 admitted that he harvested the maize in September 2022, which he supplied to Kenya Seed Co. Ltd, and was paid Kshs.880,000/=. DW1 said that he was unaware of the extent of the 1<sup>st</sup> defendant's interest or acreage in the suit land; otherwise, the arable land out of the 38 acres was only 12 acres. DW1 told the court that before the lease, he had assisted the 1<sup>st</sup> defendant in spraying the maize crop, date selling and transportation since he had a contract with Kenya Seed Co. Ltd.
19. DW1 denied service of summons from the Saboti Police Station. DW1 said that the 1<sup>st</sup> defendant needed and used the rental income to renovate his residence; otherwise, he was the one in charge of the farm at the time.
20. The plaintiff relied on written submissions dated 30/6/2025. On ownership of the suit land, the plaintiff submitted that on has to tender evidence on the root of title. She relied on Sections 24(a) and 26(1) of the *Land Registration Act*, Section 116 of the *Evidence Act*. Article 40 of *the Constitution*, Gichinga Kibutha -vs- Caroline Nduku [2019] KEELC 1276 (KLR) 1, Pankaj Kumar Hemraj Shah & another -vs- Abbas Lali Ahmed & 5 others [2019] and Bandi -vs- Dzomo & 76 others (Civil Appeal 16 of 2020). [2022] KECA 584 (KLR) (24 June 2022) (Judgment).
21. Regarding whether the plaintiff has proved ownership of the suit land, it is submitted that she produced the Title I.R 17682(LR 3801/2), confirmation of the transfer to George Ndubi as joint tenants and upon his death, a provisional certificate was issued in her name. On the use of the suit land, the plaintiff submitted that she allowed the 1<sup>st</sup> defendant limited use of the land and the 2<sup>nd</sup> defendant invaded with the full backing of the 1<sup>st</sup> defendant.



22. Again, the plaintiff submitted that she had proved her case and is entitled to damages. She relied on Attorney General -vs- Halal Meat Products Limited [2016] , Christine Nyanchama Oanda -vs- Catholic Diocese of Homa Bay Registered Trustees [2020] KECA 536 (KLR), and Mistry Valji -vs- Janendra Raichand & 2 others [2016] KECA 538 (KLR).
23. The 2<sup>nd</sup> defendant in written submissions dated 20/6/2025 submitted that he was not a trespasser since the 1<sup>st</sup> defendant has a right over the estate of the deceased George Ndubi. Further, that the lease was for 13 acres from the portion the 1<sup>st</sup> defendant who had been authorized by the plaintiff to use and plough the suit land.
24. He relied on Peter Mwangi Mbuthia -vs- Samow Edin Osman & another [2004] KECA 51 (KLR) and Karanja Mbugua & Another -vs- Marybin Holding Co. Ltd [2014] eKLR) on the proposition that mesne profits ought to be specifically pleaded and proved, which the plaintiff had failed to do and therefore not entitled to the reliefs sought,
25. The issues calling for my determination are:
  - (a) Whether the entry into the suit land through a lease with the 1<sup>st</sup> defendant without the consent or approval of the plaintiff amounts to trespass.
  - (b) If the plaintiff is entitled to general and special damages for trespass or use of her land without consent.
  - (c) What is the order as to costs?
26. Trespass refers to unjustified entry into the private land of another and the commission of an unauthorized act thereto. Trespass is also defined in Black's Law Dictionary as a violation of the right to use, access, or enjoy the benefit of one's property. Regarding trespass, out of a lease in National Oil Corporation -vs- Al-Busaidy 77 of 2018 [2022] KECA 79 [KLR] (4<sup>th</sup> February 2022) (Judgment), the court cited Lalji Karsan Rabadia & 2 others -vs- Commercial Bank of Africa Limited [2015] eKLR, that it must maintain the performance of contracts according to the intention of the parties. The court held that the purported assignment of the property to the appellant within the required express consent of the head lessor rendered the contract null and void.
27. Mesne profits as per Section 2 of the Civil Procedure Act are defined as profits which a person receives from wrongful possession received from the suit property, together with interest, but does not include profits due to improvements made by the wrongdoer and once proved, they must be paid from the date of entry till payment in full.
28. There is no dispute in this suit that the 2<sup>nd</sup> defendant was aware of the late George Ndubi and when he passed on, leaving the plaintiff as his late wife and the 1<sup>st</sup> defendant as his son. There is no dispute that the 2<sup>nd</sup> defendant did not undertake any due diligence by conducting an official search over the suit land and or reach out to the plaintiff, at the very outset to verify the capacity of the son in leasing out the land.
29. Sections 79 and 80 of the Law of Succession Act provide that the property of a deceased person vests with an executor or administrator, to whom representation has been granted. Section 45 of the Law of Succession Act provides that no person, for any purpose, shall take possession of, or dispose of or otherwise intermeddle with any free property of a deceased person, except so far as is expressly authorized by the Act or by other written law. See Veronica Njoki Wakagoto (deceased) [2013] eKLR. In Re Estate of M'Ngarithi M'Miriti [2017] eKLR, the court defined intermeddling to include taking



- possession, or occupation, disposing of, exchanging, receiving, paying out, distributing, donating, charging, or mortgaging the free property of a deceased.
30. Transmission of land subject to joint proprietorship upon the death of a co-owner is governed by Sections 60 and 91(4) of the [Land Registration Act](#). Upon proof of death, the Registrar is allowed to delete the name of the deceased tenant from the register by registering the death certificate. In joint proprietorship, no tenant is entitled to any separate share in the land and therefore death of a co-tenant, the tenant's interest vests in the surviving tenant.
  31. From the evidence tendered by the plaintiff, it is apparent that there was no severance of the joint ownership before her late husband passed on in line with Section 91(2) of the [Land Registration Act](#). It means that the 1<sup>st</sup> defendant, upon the death of his late father, could not inherit anything from the joint tenancy. Life interest only applies to a surviving spouse and not a son under Section 35 of the [Law of Succession Act](#).
  32. In *Tau Katungi -vs- Margrethe Thorning Katungi & Anor* [2014] eKLR, Musyoka J held that Section 35(1) of the [Law of Succession Act](#) does not entitle the children of the deceased to access the net intestate estate, so long as there is a surviving spouse and that the children's right to the property crystallizes upon the determination of the life interest, following the death of the life interest holder or her remarriage.
  33. The court held that, before that the widow would be entitled to the exclusive right over the net intestate estate, including receipt of any income so generated by the net estate. In *Olembo -vs- Nalanda* E&L E008 of 2024 [2025] KEELC 4484 [KLR] (11<sup>th</sup> June 2025) (Judgment), the court observed that it has no duty to rewrite contracts, unless they suffer from illegality, voidability, undue influence, or were procured through misrepresentation. The court said that he who wants the court to believe the existence of certain facts, or will fail if there is no evidence called to assert the existence of certain facts, bears the burden of proof. The court further held that the defendant could not in law feign ignorance of knowing who was the owner of the land and in that due diligence required the lessee to verify the authority and capacity of the agent, to sign or offer the land for a lease of 5 years, from the registered owner of the land.
  34. In this suit, the defendant was notified by the bona fide holder of title that she was not agreeable or aware of the lease of her land. There is evidence that despite the notification, the 2<sup>nd</sup> defendant continued unperturbed, to utilize the land and deny the plaintiff the right to use, occupy and derive income from the suit land. See *Kibui -vs- Kibui* [2025] KE CA 1149 [KLR] (20<sup>th</sup> June 2025) (Judgment). The 2<sup>nd</sup> defendant took no action to remedy the situation or, at the very least, renegotiate the lease or mitigate his risks.
  35. There is evidence that the 2<sup>nd</sup> defendant derived profits from the illegal occupation to the tune of Kshs.880,000/=. Mesne profits must be pleaded and proved. See *Hahn -vs- Singh* [1985] 716.
  36. The exhibits produced in support of the mesne profits are from the Kenya Seed Co. Ltd, where the 2<sup>nd</sup> defendant also took his farm produce. I find the same proved to the required standards. The plaintiff's suit is therefore allowed in terms of;
    - a. Declaration that the defendants are trespassers who should be evicted from the occupation of her 20 acres out of I.R No. 7682 Simuli Trend Farm situated at Saboti -Koikoi.
    - b. Mesne profits at the rate of Kshs.194,166/= per acre, totaling Kshs.2,330,000/=.
    - c. Costs.
  37. Orders accordingly.



**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT  
AT KITALE ON THIS 2<sup>ND</sup> DAY OF JULY 2025.**

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

In the presence of:

Court Assistant - Dennis

No appearance.

