



REPUBLIC OF KENYA



**KENYA LAW**  
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**Jiwa v Mombasa & another (Environment and Land Case 1B of 2022)  
[2025] KEELC 6064 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6064 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND CASE 1B OF 2022  
DO OHUNGO, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**SHAIWAZ SADRUDIN JIWA ..... PLAINTIFF**

**AND**

**HASSAN BARASA MOMBASA ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH NYONGESA MACHEUSI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Proceedings in this matter commenced on 17<sup>th</sup> September 2018, in the Environment and Land Court at Bungoma, when the Plaintiff filed Plaintiff dated 11<sup>th</sup> September 2018. The matter was later transferred to the Environment and Land Court at Kakamega, hence its current case number. The Plaintiff averred in the Plaintiff that he was the registered proprietor of the parcels of land known as Malakisi/Township/375, 413 and 419 (the suit properties) and that on 25<sup>th</sup> August 2018, the Defendants entered the suit properties without his permission, ploughed them and later started planting thereon.
2. Consequently, the Plaintiff sought judgment against the Defendants jointly and severally for:
  - a. A permanent order restraining the Defendants by themselves, their agents and or servants from entering, ploughing, planting and/or interfering in any manner with land parcel numbers Malakisi/Township/375, 413 and 419.
  - b. Damages.
  - c. Costs.
  - d. Interest.
  - e. Any other relief.



3. The Defendants filed Statement of Defence dated 20<sup>th</sup> September 2018 through which they admitted that the Plaintiff was the registered proprietor of the suit properties. They denied entering, ploughing or planting in the suit properties and prayed that the Plaintiff's suit be dismissed with costs.
4. The Plaintiff testified as PW1 and stated that he lives in Dallas, Texas in the United States of America and that he has a home in Malakisi, Bungoma County. He adopted his witness statement dated 11<sup>th</sup> September 2018 and produced copies of certificates of official search in respect of the suit properties. He stated in the witness statement that on 25<sup>th</sup> August 2018, one of his workers by the name Rodgers Simiyu Khaemba informed him that the Defendants had invaded the suit properties and started ploughing them using oxen. That the Defendants became hostile to his workers who wanted to prevent them from carrying out the said actions. He further stated that the workers reported the issue at Malakisi Police Station.
5. The Plaintiff went on to testify that the Defendants did not have his permission to enter the suit properties and plough therein. He added that he filed a case against the First Defendant's father Rajab Barasa and that the case had been concluded in his favour. He also stated that he was last in the suit properties 15 years prior to his testimony.
6. Rodgers Simiyu Khaemba (PW2) testified that he was working for the Plaintiff as his caretaker. He adopted his witness statement dated 11<sup>th</sup> September 2018 wherein he stated that on 25<sup>th</sup> August 2018, the Defendants invaded the suit properties and started ploughing them using oxen. That he informed Shukur Mohamed who was the Plaintiff's overall caretaker and who advised him to report at Malakisi Police Station.
7. PW2 further testified that when he reported for work at 8.00am on 25<sup>th</sup> August 2018, he found the Defendants ploughing the suit properties and that they threatened him when he tried to stop them. That they planted and harvested maize, that he knew the Defendants since they were residents of Malakisi and that they ploughed the land from the year 2018 to 2021 when they left but with an intention to return. He added that the First Defendant kept telling him that they will return to cultivate on the suit properties.
8. Lastly, Shukur Mohamed Omari (PW3) testified that he was a resident of Malakisi Town and that the Plaintiff had employed him as his caretaker. He adopted his witness statement dated 11<sup>th</sup> September 2018. He stated that on 25<sup>th</sup> August 2018 while he was away, PW2 called him and informed him that the Defendants had invaded the suit properties and were ploughing them using oxen. That when he returned, he went to the suit properties on 28<sup>th</sup> August 2018 and found the Defendants continuing with ploughing and planting. PW3 further testified that he knew the Defendants prior to the incident since they were residents of Malakisi and that they ploughed the entire area of the suit properties save for where buildings stood.
9. The Plaintiff's case was then closed.
10. The First Defendant testified as DW1 and stated that he was a resident of Malakisi Town. He adopted his witness statement dated 20<sup>th</sup> September 2018 wherein he denied entering and ploughing the suit properties as alleged. He further stated that the Plaintiff was harassing him because of a dispute the Plaintiff had with his father Rajab Barasa Olemuteke over payment and added that he neither knew nor had ever met the Plaintiff. He produced copies of plaint, defence and other pleadings Bungoma ELCC No. 31 of 2018. He further testified that the Defendants in Bungoma ELCC No. 31 of 2018 were his father and step mother and that the case concerned allegations that they had trespassed into the suit properties.



11. Joseph Nyongesa Wafula (DW2) testified that he was a resident of Malakisi Town and denied that he was known as Joseph Nyongesa Macheusi. He adopted his witness statement dated 20<sup>th</sup> September 2018 wherein he denied entering and ploughing the suit properties as alleged. He further testified that DW1 was his close friend from childhood and former classmate. He also stated that he did not know the Plaintiff and had never met him.
12. Rajab Barasa Olemuteke (DW3) testified that he was a resident of Malakisi and that the First Defendant is his son. He adopted his witness statement dated 20<sup>th</sup> September 2018 wherein he stated that as of the date of the statement, he was employed as a caretaker of the Plaintiff's property and that he had initially worked at a Bakery owned by the Plaintiff. That the Plaintiff and his entire family left the country after he was employed as a caretaker and that he religiously took care of the property until February 2018 when the Plaintiff demanded that he leaves the property so that the Plaintiff rents for him alternative premises. He added that the Defendant had not trespassed into the suit properties and that this suit is an attempt to intimidate his family.
13. DW3 further testified that he was in the suit properties from the year 1999 to 2020 and that an employment case which he had filed against the Plaintiff was dismissed. He added that the Plaintiff sued him in Bungoma ELCC No. 31 of 2018 and that judgment was delivered in the case on 30<sup>th</sup> November 2023 wherein he was ordered to vacate the suit properties. He stated that he vacated as ordered and that although the Plaintiff told him to vacate in the year 2018, he did not vacate because he was still claiming his employment dues.
14. The Defence case was then closed after which directions for filing and exchange of written submissions were given. The Plaintiff filed submissions dated 31<sup>st</sup> January 2025 while the Defendants filed submissions dated 5<sup>th</sup> February 2025.
15. I have considered the pleadings, evidence and submissions. The issues that arise for determination are whether trespass has been established and whether the reliefs sought should issue.
16. The Plaintiff's case is that the Defendants trespassed on the suit properties. 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.
17. 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* 3<sup>rd</sup> edition volume 38 at pg 744.
18. There is no dispute that the Plaintiff is the registered proprietor of the suit properties. Judging from the copies of the certificates of official search that the Plaintiff produced, it is manifest that the Plaintiff was registered as proprietor of the suit properties on 17<sup>th</sup> August 2016 and title deeds issued to him on the said date.
19. 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 under Article 40 of the *Constitution* which secures protection of right to property and Sections 24 and 26 of the *Land Registration Act*. Pursuant to Section 26 of the *Land Registration Act*, the Court is obligated to accept the proprietor's certificates



of title as *prima facie* evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established.

20. 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.

21. The Plaintiff's case is that the Defendants invaded the suit properties on 25<sup>th</sup> August 2018 and started ploughing them using oxen. The Plaintiff has relied on the testimony of Rodgers Simiyu Khaemba (PW2) who stated that on the said date at 8.00am he found the Defendants ploughing in the suit properties. PW2's testimony is supported by that of PW3. While the Defendants have generally denied the Plaintiff's claim of trespass, there are several factors that have led me to find the testimony of the Plaintiff and his witnesses credible. Firstly, the Defendants were not strangers to the area. They were residents Malakisi where the suit properties are situated and were longstanding friends.
22. Secondly, although both Defendants denied knowing the Plaintiff, I am persuaded that they were not candid. The First Defendant's father (DW3) testified that he worked for the Plaintiff and was resident in the suit properties from the year 1999 to 2020 when he vacated. In those circumstances, the First Defendant cannot feign not knowing the Plaintiff. Despite his claims of not knowing the Plaintiff, the First Defendant testified that there was litigation between the Plaintiff and his parents in Bungoma ELCC No. 31 of 2018. The copy of the plaint which he produced shows that the said case was filed on 20<sup>th</sup> June 2018, before the date of invasion.
23. Further, DW3's date of departure from the suit properties aligns with the duration of trespass as given by the Plaintiff. As of 25<sup>th</sup> August 2018 when the trespass took place, DW3 was still in the suit properties and the litigation in Bungoma ELCC No. 31 of 2018 concerning the suit properties was ongoing.
24. I have taken note of the Defendants' argument that the Plaintiff ought to have produced evidence of a report of the invasion to the police by way of an entry in the Occurrence Book (OB). Failure to produce an OB entry or even failure to report a trespass to the police is not fatal to a civil claim under the tort of trespass. On a balance of probabilities, I am persuaded that the Defendants entered the suit properties without the Plaintiff's consent on 25<sup>th</sup> August 2018, ploughed them and cultivated them until the year 2021. Trespass has been established.
25. I now turn to the question of whether the reliefs sought are available. The Plaintiff sought a permanent injunction to restrain the Defendants and their agents or servants from interfering in any manner with the suit properties. In view of the uncontested proprietorship coupled with the finding of trespass, I am persuaded that a case has been made for the permanent injunction.



26. The law is that that trespass to land is actionable per se. The Court of Appeal restated the principles in *Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited* [2017] KECA 358 (KLR) thus:

It is trite law and as correctly submitted by counsel for the respondent that trespass to land is an actionable tort per se and proof of damage is not necessary or required. In other words, where trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damage or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course depending on the facts of each case. See *Simiyu v Sinino* [1985] eKLR and *Obadiah K. Macharia v Kenya Power and Lighting Company Limited*.

27. In *Kenya Power & Lighting Company Ltd v Ringera & 2 others* [2022] KECA 104 (KLR), the Court of Appeal distilled the principles applicable to assessment of quantum of damages for trespass as follows:

- i) *Harlsburys Laws of England* 4th edition vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
- ii) *Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another* [2013] eKLR - 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.
- iii) *Philip Ayaya Aluchio vs. Crispinus Ngayo* [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.

28. In this case, the Defendants trespassed into the suit properties on 25<sup>th</sup> August 2018 and remained therein while cultivating maize until the year 2021. In those circumstances, I am persuaded that the Plaintiff is entitled to reasonable damages. The Plaintiff has proposed Kshs 2,000,000. I find that sum to be on the higher side. Taking all factors into account, I award Kshs 500,000 under the head of damages for trespass.

29. In view of the foregoing discourse, I find merit in the Plaintiff's case, and I enter judgment in his favour against the Defendants jointly and severally as follows:

- a. A permanent injunction is hereby issued restraining the Defendants by themselves, their agents and or servants from entering, ploughing, planting and/or interfering in any manner with land parcel numbers Malakisi/Township/375, Malakisi/Township/413 and Malakisi/Township/419.
- b. Kshs 500,000 (Five Hundred Thousand) being general damages for trespass.
- c. The Plaintiff shall have costs of the suit and interest on both costs and the general damages.



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

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Ms Wanyama holding brief for Mr Onchiri for the Plaintiff

No appearance for the Defendants

Court Assistant: B Kerubo

