



**Mwenda (Suing As The Administrator Of The Estate Of Francis Kalunge
Mwenda – Deceased) v Mukiamo & 2 others (Environment & Land Case
E008 of 2023) [2024] KEELC 4176 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4176 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E008 OF 2023**

**CK NZILI, J
MAY 8, 2024**

BETWEEN

**LILIAN GACERI PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF FRANCIS KALUNGE
MWENDA – DECEASED**

AND

**JOSHUA KIRIMI MUKIAMA 1ST DEFENDANT
MUTWIRI MUKIAMA 2ND DEFENDANT
KAINDIO IGWETA 3RD DEFENDANT**

JUDGMENT

1. The plaintiff approached this court through a plaint dated 5.5.2023 as the widow and the legal administrator of the late Francis Kalung'e Mwenda. She averred that the deceased was the recorded owner of Parcel No. 2591 Karama Adjudication Section, which borders Parcel No. 903, belonging to the late Zakaria Kanyi. Her claim against the defendants is for illegal trespass, subdivision and destruction of land and illegal occupation of it by the 1st defendant, allegedly interred the remains of the late Zakaria Kanyi on the land in 2.4.2023 with the intention of grabbing the land.
2. Further, the plaintiff averred that after burying the deceased on her land, the defendants fenced off a portion of land and hence have been unable to access part of her land, which is under cultivation, hence loss of the user. The plaintiff, therefore, prayed for:
 - a. Declaration that the deceased's estate owns the land.
 - b. Exhumation of the remains of the deceased Zakaria Kanyi from her land.



- c. Permanent injunction and
 - d. Mesne profits.
3. The defendants opposed the suit through a statement of defense 29.5.2023 signed by the 1st defendant and denied laying claim over the suit land by way of an alleged invasion, forceful trespass to the land, subdivision, or destruction thereof.
 4. The defendants averred the late Zakaria Kanyi was buried on his Parcel No. 903 Karama Adjudication Section, which had an objection before the area District Land Adjudication and Settlement Officer (DLASO), regarding boundaries and demarcation, which was dismissed since P/No's. 903 and 2591 were separate and distinct, hence paving the way for the burial on the deceased parcel of land. The defendants averred that the plaintiff unsuccessfully moved to court to stop the burial in Tigania PMCC ELC No. 12 of 2023 through an application and a suit, which suit is still pending; hence, this suit is sub-judice.
 5. The defendants averred that the deceased was buried on P/No. 903 Karama Adjudication Section measuring 1.30 acres, where he had previously erected a semi-permanent house, had lived there all his lifetime, and was found dead and had also buried his late father therein. The defendants averred it was lawful for them after the burial to fence off the land as per the demarcated acreage and boundaries, which were distinct and separate from the plaintiff's Parcel No. 2591 measuring 0.50 acres and were therefore only protecting the parcel, belonging to the deceased.
 6. At the trial, Lilian Gacheri Mwenda testified as PW 1 and adopted as her evidence in chief a witness statement dated 5.5.2023. She told the court she was a legal administrator of the estate of Francis Kalunge Mwenda pursuant to a grant in NRB H.C Succession Cause No. 3099 of 2007 and the registered owner of P. No 2591 Karama Adjudication Section. She claimed that the 1st defendant had been trying to take away her land, using the name of the late Zakaria Kanyi, owner of Parcel No. 903 Karama Adjudication Section. She said the 1st defendant purported to bury the remains of the deceased on her land, and after the burial, he joined hands with the 2nd & 3rd defendants to fence off part of her land, hence denying her access to and user of the land. To sustain her case, she produced a copy of a consent to sue from the land adjudication officer dated 25.4.2023 as P. Exh No. (1) confirmation of ownership letters as P. Exh No. (2), (3) & (4) newspaper extract as P. Exh No. (5), survey letters dated 16.2.2023 as P. Exh No. (6), land survey report dated 2.5.2023 as P. Exh No. (7), survey map as P. Exh No. (8), letters of administration dated 6.3.2008 as P. Exh No. (9), amended certificates of confirmation of grant as P. Exh No. (10) O.B. reports as P. Exh No. (11), photographs as P. Exh No. 12 (a), (b), objection proceedings as P. Exh No. (13), letter from the ODPP dated 3.11.2015 as P. Exh No. 14, crop damage assessment report dated 1.9.2014 as P. Exh No. (15), elders award as P. Exh No. (16), complaint letter to the Director of Land Adjudication Nairobi dated 24.10.2012 as P. Exh No. (17) and summons to appear before the land adjudication officer dated 5.11.2020 as P. Exh No. (18).
 7. PW 1 said Parcel No. 903, belonging to the late Kanyi Zakaria, was not captured in the area map and was unable to access her land due to threats, harassment, and intimidation by the defendants who have trespassed onto her land and committed loss and damage.
 8. In cross-examination, PW 1 said her late husband bought several pieces of land before the gathering from among the sellers, one M'Igweta in 1995, which he consolidated and fenced, totaling close to 12 acres. She said the area was still under demarcation. Further, PW 1 said Parcel No. 903 was adjacent to her land, whose history she would not tell.



9. PW 1 said what was on the ground corresponded with the adjudication records. Her evidence was that Parcel No. 903 was outside her land as per the land surveyor's report.
10. Moses Gitonga testified as PW 2 and adopted his witness statement dated 5.5.2023 as his evidence in chief. He told the court his late father, Francis Kalunge Mwenda, used to own 12.76 acres of land bordering Parcel No. 903 belonging to the late Zackaria Kanyi. He said the boundary between his father's land and that of the late Zackaria Kanyi was severally set by the DLASO, and the deceased showed the locality of his land.
11. PW 2 said the objection proceedings were heard and determined after the late Kanyi passed on while being represented by Joshua Kirimi. PW 2 said a letter from the ODPP was written following a complaint and that the culprit was eventually arrested, charged, convicted, and sentenced to one-year probation in Tigania Cr. Case No. 874 of 2013. PW 2 clarified that the record of existing rights shows Parcel No. 2591 is 1276 acres and belongs to this late father.
12. Martha John testified as PW 3 and adopted his witness statement dated 5.5.2023 as his evidence in chief. She confirmed that the late Zakaria Kanyi was buried at night around 10.00 pm on 20.4.2023, on the disputed land.
13. Joshua Kirimi Mukiyama testified as DW 1 and adopted his witness statement dated 7.9.2023 as his evidence in chief. He told the court that he was the legal representative of the estate of the late Zakaria Kanyi pursuant to a letter of grant ad litem dated 20.7.2023 in Meru CM Misc Succession Cause No. 113 of 2023. He said that the deceased uncle was the recorded owner of Parcel No. 903 Karama Adjudication Section, neighboring the plaintiff's Parcel No. 2591, which the plaintiff's late husband bought as 0.50 acres from one Daniel Igweta in 1995, fenced and built a home there. He said the land was a subdivision of Parcel No. 176, which became Parcel No. 255 before it was recorded as parcel No. 2591, a consolidated parcel number.
14. Similarly, DW 1 said that during the adjudication stage, they noticed that on paper Parcel No. 2591 was more extensive than 0.50 acres, and upon inquiries, it was established that in 2004, the late Francis Kalunge had consolidated various portions of his land from unknown places and fraudulently added them to his original ground, making a total of 12.76 acres. He termed the acreage as fiction for the seller, Daniel Igweta, who had no more land than 0.50 acres that could have been sold to the plaintiff's late husband.
15. Additionally, DW 1 told the court the late Zakaria Kanyi's land, which he inherited from his late father M'Limbitu M'Ichuriu, was 2 acres which he subdivided into Parcels No's. 2049, 5494, and 16051, which were yet to be implemented in the area map.
16. D.W. 1 said that both the late Zakaria and his late father have been on the land all their lives, which is district and separate from the plaintiff's land. He said that upon the death of Zakaria Kanyi, the deceased's family decided to bury his remains on his land, only for the plaintiff to purport to block the burial through objection proceedings and court case No. Tigania CM ELC No. 12 of 2023. He disputed the contents of a land survey report dated 2.3.2023, filed at Tigania Law Courts to the effect that what was in dispute was 0.302 ha.
17. Further, DW 1 said that the plaintiff was in occupation of and had only developed land Parcel No. 2591. He said the plaintiff acquired it from one Daniel M'Igweta M'Munoru as a subdivision from Parcel No. 176, delineated as Parcel No. 255, and later on as Parcel No. 2591. He denied any alleged grabbing, trespass, and destruction of the plaintiff's land. DW 1 produced a copy of the letters of grant ad litem, confirmation letter of ownership dated 10.2.2023, records of existing rights reports, letter dated 17.2.1994, court order in Tigania PM ELC No. 12 of 2023 and the ruling, a request for waiver



- of mortuary charges dated 20.4.2023, burial permit and surveyor's report dated 2.5.2023, photographs as D. Exh No. 1-13 (a), (b) & (c) respectively. He told the court that his late uncle used to live on the suit land where his late father used to live until he was taken ill and succumbed to the illness.
18. In cross-examination, DW 1 told the court that he had been a land adjudication committee member for Karama Adjudication Section and that he managed to obtain D. Exh No. (7) from the office file. He expressed reservations about the land surveyor's report that the Tigania law courts had sanctioned since it was partisan or biased out of the influence of the plaintiff. DW 1 admitted that D. Exh No. 3 was not certified even though it bore a stamp from the land adjudication offices.
 19. Kanyongi Isaac Igweta testified as DW 2. He confirmed that the late Francis Kalunge Mwenda was sold a portion of their land by his late father as per D. Exh No. (7), measuring 0.50 acres. In cross-examination, DW 2 told the court that his late father used to own Parcel No. 176, out of which the plaintiff's land was hived from Parcel No. 2591. Furthermore, he confirmed that the late Zakaria Kanyi had sold several portions of Parcel No. 903 before he passed on.
 20. With the close of the defence case parties were directed to put in written submissions. The plaintiff relied on written submissions dated 19.2.2024 and isolated six issues for determination. On whether the plaintiff is the bonafide owner of Parcel No. 2591 Karama Adjudication Section, the plaintiff submitted her evidence was corroborated by P. Exh No. 2, 3 & (4), separate from Parcel No. 903, owned by the late Zakaria Kanyi.
 21. The plaintiff submitted that P. Exh No's. (7) & (8) were clear that her parcel of land was separate and distinct from that of the late Rukaria Kanyi, which the 1st defendant has illegally annexed and trespassed into, going by the land surveyor report, that traced Parcel No. 903 on the ground and from the land records. The plaintiff submitted that the land surveyor's report clearly indicated there had been a trespass to her land.
 22. Further, the plaintiff submitted that D. Exh No.2, 3 & 4 showed Parcel No. 903 was approximately 1.30 acres, and going by the land surveyors' report, the area within Parcel No. 2591 marked B1, which the defendant is claiming is approximately 0.75 acres, while the larger area marked B is approximately 2.8 acres.
 23. Regarding Objection No. 903 produced as P. Exh No. (13), parties were heard, and a finding was made that parcel No. 903 bordered Parcel No. 2591 and the DLASO stopped the burial of the late Zakaria Kanyi on the plaintiff's land, yet the defendants proceeded to bury him therein; that was a clear case of trespass.
 24. On the reliefs sought, the plaintiff submitted that given the admission that DW 1 was a member of the land adjudication committee, he must have abused his powers for personal interests to ignore not only the land surveyor's report but also the adjudication records to trespass into and erect buildings on Parcel No. 2591 unjustly.
 25. The plaintiff submitted DW 2 confirmed that the late Zakaria Kanyi had sold some of his lands in 2010 to third parties, yet DW 1 claimed that the late uncle left some land for him. The plaintiff submitted that the defendants called none of the third parties to corroborate their evidence to show their boundaries with the deceased and the plaintiff. Relying on M'Thamki M'Marambei (suing as the legal representative of the Estate of Peter Miriti vs BOM Miathene High School (2020) eKLR, which cited Larkin vs Nissan Electric R.B Co. 98 N.E 465 (N.Y) (1912) that repugnant statement or contraries cannot be accurate and the fact that the witness has made them tend to show that he is untrustworthy, through carelessness an uncertain memory or dishonesty.



26. The plaintiff submitted her exhibits on ownership, particularly P. Exh No's. (4), (14) (16), (17) and (18) confirmed the issue of trespass. Therefore, the plaintiff submitted that the 1st defendant was hell-bent on frustrating her, and unless the court intervenes, she shall suffer grave loss and damage.
27. The defendants relied on written submissions dated 23.2.2024 that the plaintiff was unable to justify how her late husband accumulated 12.76 acres contrary to what he bought as 0.50 acres from DW 1's late father. The defendants submitted that Section 21 of the Land Consolidation Act was not followed in the said consolidation of the alleged several parcels to make Parcel No. 2591 its current locality.
28. The defendants submitted P. Exh No. (13), showing an objection was raised against Parcel No. 2591 and dismissed by the Land Adjudication Officer, who also noted that the two parcels had a problem on the ground. The defendants submitted that the A/R objections were premature as they were brought before the adjudication register was completed under Sections 16, 17, 18 & 25 of the Land Consolidation Act (Cap 283).
29. The defendants submitted that this suit was prematurely filed for the Adjudication register is still pending completion such that this court cannot ascertain the plaintiff's rights. Relying on *Mugere Kamotho vs James Muchiri Ndegwa & others* (2019) eKLR, the defendants submitted that this court should not usurp the responsibilities of the institutions set under Cap 283.
30. On exhumation, the defendants submitted that the deceased was legally and adequately buried on his parcel and not Parcel No. 2591 as per Section 21 of the Births & Deaths Registration Act (Cap 149) and Section 146 of the Public Health Act. The defendants submitted that the burial was not irregular or unlawful since they had both a burial permit as well as a chief's letter produced as D. Exh No. (10) and that there was no court order stopping such a burial.
31. The court has carefully gone through the pleadings, evidence tendered and the law. The issues calling for my determination are:
 - i. If the court has jurisdiction to hear and determine this suit.
 - ii. If the plaintiff should have exhausted the internal mechanism set under the Land Consolidation Act (Cap 283).
 - iii. If the plaintiff proved trespass to her land.
 - iv. If the defendants were justified in entering, erecting structures, burying the remains of the late Zakaria Kanyi and remaining on the suit land.
 - v. If the plaintiff is entitled to the reliefs sought.
 - vi. What is the order as to costs?
32. The plaintiff brought this suit pursuant to a consent to sue issued on 25.4.2023 by E.M Kamaru, a Sub-County Land Adjudication Officer under Section 8 (1) of the Land Consolidation Act and Section 30 of the Land Adjudication Act. The nature of the dispute was indicated as an eviction order and trespass. In *Tobias Ochola Osidi & others vs. Cyprianus Otieno Ogolla & 6 others* (2013) eKLR, the dispute between the two claims related to the ownership of several parcels of land situated at Amoyo sublocation within Kakelo Kakotho Adjudication Section said to have been inherited by the plaintiff's clan. The adjudication was still ongoing. The defendants from another clan had allegedly invaded the area under adjudication and commenced farming activities thereon. The plaintiffs had successfully objected to the defendants' claim under Cap 284 which did not elicit any appeal to the Minister by the defendants. The plaintiffs had claimed that despite the status of their land and given the binding



- determination of the objection in their favor, the defendants should have vacated and handed over vacant possession to them.
33. Leave had been given to the plaintiffs to institute the suit for a declaration that they were the legal owners of the land and that the acts of the defendant amounted to trespass or forcible detainer, an order for eviction, mesne profits, and permanent injunction. In their defense, the defendants had termed the registration irregular, unlawful and fraudulent, since the registration did not capture or cover the ground on which the suit properties were situated, for it was Kakelo – Kakotho B Adjudication Section.
 34. Regarding the consent to sue, the defendants had averred it was erroneous and contradictory; the suit was misconceived as bad in law and legally untenable under the Limitation of Actions Act, the Land Adjudication Act and the Law of Succession Act and that the court had no jurisdiction to hear and determine the issue of ownership.
 35. After hearing evidence from the parties, the court made several findings. First, it held that a claim under Section 13 (5) of Cap 284 could be made by successors of a deceased person and not necessarily the deceased legal representatives since such a claim is for the ascertainment of the rights and interest of land within an adjudication area. The court went on to say that after the ascertainment of those rights or interests, any other interests outside Cap 284 can only be pursued by a legal representative. Secondly, the court said it had no jurisdiction save a supervisory role to ascertain and determine interests in land in an adjudication area.
 36. Additionally, the court held that a consent to sue issued under Section 30 of Cap 284 does not entitle a party who has an interest in land within an adjudication area to bring up to court for determination issues that should be determined by the adjudication officer or the resolution mechanisms set out under the Act. The court said a title to land within an adjudication area is obtained by operation of the law after the completion of the adjudication process. It held that a court could not declare the plaintiffs the lawful proprietors of the land before the process of adjudication was completed, and they are registered as proprietors of the suit land under the Land Registration Act.
 37. On the irregularity, illegality and status of the land, as claimed by the defendants, the court said that jurisdiction to ascertain and determine interests rested with the relevant bodies under Cap 284 who have the machinery to resolve any disputes that may arise in the process of the adjudication including the parameters of the area declared as under adjudication. The court said it could not order the eviction of the defendants until the plaintiff's right and interest over the land had crystallized by the registration of the plaintiffs as owners under the Land Registration Act (2012) after the conclusion of the adjudication process. The court said that since the adjudication process was ongoing, it would be prejudicial to the said process to declare either of the parties as the lawful owners of the land, and that once the adjudication process was concluded, the plaintiffs would be at liberty to move the court.
 38. In the instant suit, both parties are in agreement that the process of the land adjudication is still ongoing. The plaintiff has pleaded, testified, and submitted that after the A/R objection was dismissed, no appeal was preferred to the Minister. On the other hand, the defendants have termed the plaintiff's suit as premature since the adjudication register has not been published under Sections 16, 17, 18 & 25 of Cap 283 for purposes of calling for A/R objections.
 39. The plaintiff's case on trespass is based on a land surveyor's report produced as P. Exh No. (7), which the defendants have termed as biased, partisan and influenced by the plaintiff. Trespass refers to unjustified entry into remaining therein and the commission of wrongful acts on private land without the permission of the owner. See *Festo Sewe Obiero vs Caleb Omondi Opiyo & others* (2020) eKLR and *Rhoda S. Kiilu vs Jiangxi Water & Hydropower Construction (K) Ltd* (2019) eKLR.



40. In this suit, the plaintiff has produced P. Exh No's (3) and (4) to show the acreage of her land. The defendants have denied the alleged acreage on the basis of evidence of gathering other parcels of land to make a total of 12.76 acres on top of what DW 1's late father sold to her late husband as 0.50 acres.
41. There is no evidence that there is a pending appeal or objection to the plaintiff's acreage of 12.76 acres with the land adjudication officer or the minister. Unlike in Tobias Ochola's vs Cyprianus Otieno (supra) case, where a minister's appeal was pending on one of the parcels under dispute, in this suit, the defendants have no pending dispute against the acreage and the locality of Parcel No. 2591 vis a vis Parcel No. 903. There is also no record to show that the 1st defendant has appealed against the land surveyor report and the ODPP recommendations for a charge of trespass. D. Exh No. (9) related to an application that was struck out and not determined on merits for lack of locus stand.
42. In this suit, the plaintiff is in possession of letters of administration P. Exh No. 9. The defendants failed to call rival evidence to challenge or substantiate their allegations that P. Exh No. (7) is biased, erroneous, illegal, and or fraudulent.
43. There is no dispute that the plaintiff has proprietary interests over parcel No. 2591, which she has acquired under the law. The plaintiff, in my view, is entitled to have her rights or interests to land protected under Order 40 of the Civil Procedure Rules and Article 40 of the Constitution.
44. As to the prayer for exhumation and mesne profits, trespass once proved is actionable perse and proof of specific loss or damage is immaterial. The court is, in such circumstances, under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. See Park Towers Ltd vs John Mithamo Njoka & others (2014) eKLR.
45. The right to use and enjoy the suit property by the plaintiff has been interfered with. The defendants were notified of the trespass vide land surveyor report dated 2.5.2023. Several O.B. reports were made to the police as per P. Exh No. (11), P. Exh No. 14 shows a report by the ODPP dated 3.11.2015 found the 1st defendant culpable. P. Exh No. 17 was written on 20.10.2012.
46. The plaintiff, as per P. Exh No. (7), which is also D. Exh No. (12), has been denied approximately 0.302 ha out of her entire land by the defendants. Evidence was not provided on the value of the disputed portion under occupation by the defendants. The plaintiff has, however, been denied use and enjoyment of the land for close to ten years. In Duncan Nderitu Ndegwa vs. KPLC Ltd & another (2013), eKLR Kshs.100,000/= was awarded as compensation for trespass.
47. In Gilbert Agengo Owino vs Ezekiel Otieno Abhono & another (2017) eKLR, the area occupied by the defendants had not been given, and the value thereof the court granted orders of vacant possession and costs. In this suit, the crop assessment report made on 1.9.2014 and produced as P. Exh No. (15) shows the cost was Kshs.40,600/= for the damaged crops. P. Exh No.(16) assessed the damage as Kshs.1,319,320/=.
48. In Nakuru Industries Ltd vs S.S Mehta & Sons (2016) eKLR, the court said that in tort, damages are awarded as a way to compensate a plaintiff for losses he has incurred due to wrongful action on the part of the defendant, so as to return him to the position he was before the wrongful act commenced.
49. In Ochako Obinchi vs Zachary Oyoti Nyamongo (2018) eKLR, the court said that though no evidence had been led, the plaintiff was entitled to reasonable compensation for the deprivation of the use of his house and land for over five years. In my humble view, the plaintiff has been denied use of the land since 2023. I believe Kshs.100,000/= for every year would be reasonable compensation.



50. Concerning exhumation, the 1st defendant had been warned in the land surveyor's report where the deceased land was. DW 1 says there was no order stopping the burial.
51. The 1st defendant was also warned through the lower court suit in Tigania Law Courts that it was the plaintiff who was contesting the burial site. He instead went ahead to bury the deceased and fenced off the land after that. The 1st defendant did not seek to comply with the land surveyor's report, during the burial which would have guided him on the exact locality of the deceased land. The 1st defendant cannot feign ignorance of all these facts. It did not matter that there was a burial permit or a chief's letter.
52. In Augustine Barasa Khisa vs Lazaro Namasake & another (2016) eKLR, at issue was a forceful burial on the disputed land, said to have been sold by the deceased before he died but refused to sign the transfer forms after the hearing the court found it improper to bury the deceased on the land by force when he had relinquished his rights on the land.
53. DW 1, in this suit, admitted that the participants were at the burial at night. No justification has been made for the same, more so when the land belonged to the plaintiff.
54. Given that the land is yet to be registered in favor of the plaintiff, I find no basis to grant prayer No. (a) & (b) of the plaint dated 5.5.2023 since the land is still under adjudication and the section is yet to be declared as complete under Section 104 of the Land Registration Act. Costs shall be to the plaintiff.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 8TH DAY OF MAY, 2024

In presence of

C.A Kananu

Parties

Miss Muna for defendant

Maheli for the plaintiff

HON. C K NZILI

JUDGE

AMMENDED ON 8TH JULY 2024

HON. C.K NZILI

JUDGE

FURTHER AMENDED ON 11TH DECEMBER 2024

HON. C.K NZILI

JUDGE

