



Musyoka (Suing as the Legal Representative of the Estate of Musyoka Muthisya - Deceased) & 6 others v County Government of Kitui & another (Environment and Land Case Civil Suit 31 of 2021) [2023] KEELC 649 (KLR) (7 February 2023) (Judgment)

Neutral citation: [2023] KEELC 649 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND CASE CIVIL SUIT 31 OF 2021
LG KIMANI, J
FEBRUARY 7, 2023**

BETWEEN

GABRIEL MUSILI MUSYOKA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MUSYOKA MUTHISYA - DECEASED) 1ST PLAINTIFF
JUSTUS MUTAI MUSYOKA 2ND PLAINTIFF
ANDREW MUSYA MUSYOKA 3RD PLAINTIFF
DENNIS MWAMBI MUSYOKA 4TH PLAINTIFF
JOSEPH MUTHIANI MUSYOKA 5TH PLAINTIFF
JOHN MWALYA MUSYOKA 6TH PLAINTIFF
THEOPHILUS KYENI MUSYOKA 7TH PLAINTIFF

AND

THE COUNTY GOVERNMENT OF KITUI 1ST DEFENDANT
THE NATIONAL LAND COMMISSION 2ND DEFENDANT

JUDGMENT

1. Before the court is a suit filed by way of plaint amended on 12th October 2017. The 1st Plaintiff claims to be the legal representative of the estate of Musyoka Mutisya (Deceased) who is the registered proprietor of land parcel Kyuso/Kyuso 'A'/307 measuring approximately 35.8616 Ha while the 2nd Plaintiff is the proprietor of Kyuso/Kyuso 'A'/298 measuring 0.0600Ha where he has erected a block of 14 units of rental houses with a monthly rental income in the region of Ksh. 100,000.00. The 3rd Plaintiff is the proprietor of Kyuso/Kyuso 'A'/305, while the 4th Plaintiff is the proprietor of Kyuso/Kyuso 'A'/306. The 5th Plaintiff is the proprietor of Kyuso/Kyuso 'A'/297, while the 6th Plaintiff is the proprietor of



Kyuso/Kyuso 'A'/294, Kyuso/Kyuso 'A'/296 and Kyuso/Kyuso 'A'/301. Finally, the 7th Plaintiff is the proprietor of Kyuso/Kyuso 'A'/304.

2. The Plaintiffs claim that the 1st Plaintiff is father to the 1-7th Plaintiffs and that he willfully donated a parcel of land along Kyuso-Tseikuru Road in Kyuso town to the defunct county council of Mwingi for use as a stadium which was demarcated as Land Parcel number Kyuso/Kyuso 'A'/300 measuring approximately 1.747Ha.
3. The deceased then allocated the remaining land bordering Kyuso stadium to his sons, the 2nd, 3rd, 4th, 5th, 6th, and 7th plaintiffs herein. The land was recorded in their names as averred in the amended plaint and title deeds have been issued. The plaintiffs have gone ahead to develop their respective parcels of land and erected both commercial and residential houses.
4. The Plaintiffs' case is that on or about the 26th February 2015, the 1st Defendant encroached into the suit parcels of land and erected beacons and brought a contractor to erect a fence around the land. They aver that despite the existence of this suit and an order for maintenance of status quo the 1st Defendant proceeded and erected a fence that completely blocked the entrance to the Plaintiffs residential buildings thus effectively locking the occupants out of the houses.
5. The Plaintiffs aver that the 1st Defendant illegally and unlawfully encroached onto their parcels of land as it has no authority to move onto the land without the Plaintiffs' consent. As a result of the 1st Defendant's actions, the Plaintiffs aver that they have suffered immense loss and damage in that rental business has negatively affected there has been destruction of property, loss of user of land, locking the plaintiffs from the suit land and loss of rental income.
6. For these reasons, the Plaintiffs pray for an order prohibiting the 1st Defendant from dealing with their properties, a declaration that they are the rightful owners of the said parcels of land, permanent injunction against the Defendants from interfering with their parcels of land, a mandatory injunction to compel the Defendants to give vacant possession to the Plaintiffs their registered parcels of land and general damages for loss of business and user of land.

The 1st Defendants' Case

7. The 1st Defendant filed an Amended Statement of Defence and Counter-claim amended on 17th April 2018 denying the contents of the Amended Plaint. It is stated that on or about 11th November 1958 Kyuso stadium was gazetted as a trust land by the Government in accordance with the native Trust Ordinance Act CAP 100 vide Gazette Notice 4246. The said stadium which measures approximately 31.11 acres and is part of Kyuso market. Further, that sometime in November 1978, the then Ministry of Lands and Settlement prepared and approved the Kyuso Development plan as per the gazetted boundaries.
8. Notwithstanding the approved plan, the Plaintiffs are accused of fraudulently, unlawfully, and without any colour of right, colluding with the Land Adjudication officer in charge of Kyuso 'A' adjudication section sometime in the year 2010 to have sections of the market adjudicated to themselves without the 1st Defendant's knowledge. The 1st defendant and denies that the plaintiffs have ever had ownership of the suit land.
9. The 1st Defendant prays that the parcels of land registered in the plaintiffs' names be declared as forming part of the gazetted trust land for Kyuso market, an order of permanent injunction restraining them from trespassing and interfering with the gazetted trust land for Kyuso market and for an order directed to the County Land Registrar-Kitui for cancellation of registration of the plaintiffs as owners of the suit parcels of land registered in the Plaintiffs' names.



10. The 2nd Defendant did not enter appearance or file a defence though they were served with summons to enter appearance and an affidavit of service filed in court.

Evidence at the trial

11. PW 1 the 1st Plaintiff Gabriel Musili Musyoki adopted his witness statement dated 2nd October 2017. He produced exhibits appearing on his list of documents dated 12th October 2017. He stated that he is the son of the late Musyoka Muthisya (deceased) and administrator of his estate.
12. He stated that his father settled on the suit land in 1962 and lived there all his life. That sometime in 1970 his father donated a small share of the land bordering Kyuso-Tseikuru road for use as a stadium and/or public ground. The land was officially measured and totaled 100ft by 50ft and the adjoining plots were also measured. That sometime in 2012 Kyuso sub county was declared an adjudication section under “Kyuso “A” Adjudication section and the land was surveyed and eventually title deeds issued. He further testified that public meetings were called for the purpose of adjudication. The stadium was adjudicated as KYUSO/KYUSO A”/300 measuring approximately 1.747 HA while the plots adjacent to the stadium were adjudicated to the Plaintiffs as stated in the plaint. That on 6th February, 2015 the 1st Defendant invaded the suit parcels of land purporting to fence off the stadium but without any colour of right included the plaintiffs land. Despite court orders the 1st Defendant continued to fence off the land and encroach on the Plaintiffs land thus causing them loss and damage.
13. PW 2 Justus Mutani, the 2nd Plaintiff testified that he is a son of the deceased 1st Plaintiff. He adopted his two witness statements dated 2nd October, 2017 and 8th October 2018 as his evidence-in-chief. He stated that he is the registered owner of one of the suit land parcel number Kyuso/Kyuso ‘A’/298 which he inherited from his father. That in 2009 he obtained financing from a bank and SACCO and constructed a block of 14 units which were completed in 2012 and he got tenants from whom he used to receive rent of Kshs. 100,000/- per month.
14. PW2 confirmed that in March 2015 he received information that persons purporting to have been instructed by the 1st Defendant were digging holes around his parcel of land to erect a fence which effectively would lock his tenants from accessing their houses. It was then that he agreed with his father and his siblings to file this suit. According to PW 2, the County government encroached on their parcels and the tenants moved due to threats and intimidation. He also confirmed that all public utilities are on the west side of Kitui-Mivukoni Road while they are on the right side.
15. PW 2 quantified the loss of rental income at Ksh.100, 000 per month and prayed that the land be given back and to be paid damages for lost income. Upon cross-examination, PW 2 stated that he got a court order upon filing the suit in March 2015 stopping the county government from fencing off plots but the orders were never obeyed. He took out contempt proceedings but later withdrew them in order to save time and have the suit proceed for hearing.
16. The Defence closed their case without calling any witness.

Plaintiff’s submissions

17. The Plaintiffs submitted that they have been in occupation of their respective parcels of land since 1962 when their father, Musyoka Muthisya(Deceased) settled in Kyuso. The area where the suit parcels are situated fell under adjudication and the Plaintiffs were issued with individual title deeds for their parcels of land. The 1st Defendant was also issued with title for their parcel where Kyuso Stadium is being Land Parcel No.Kyuso/Kyuso ‘A’/300.



18. It is the Plaintiffs submission that from the material placed before court, it is not in dispute that the Plaintiffs are the registered proprietors of the suit properties and their titles remain absolute and indefeasible as per Section 26 (1) of the *Land Registration Act*.
19. Counsel for the Plaintiffs submitted that the 1st Defendant trespassed on the suit properties without their express permission and erected a chain link fence around the property. They relied on the case of *Ajit Bhogal vs Kenya Power and Lighting Co.Ltd(2020)* eKLR where the court held that where trespass is proved, a party need not prove that he/she suffered any specific damage or loss to be awarded damages.
20. The Plaintiffs also relied on the case of *Philip Ayaya Aluchio v Crispinus Ngayo [2014]* eKLR where the court held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less.
21. Counsel for the Plaintiffs quantified general damages for the 1st Plaintiff who has been unable to develop and use the land for 8 years as Ksh.35,000,000, the 2nd Plaintiff who had a block of 14 rental units at Ksh.25,000,000, the 3rd Plaintiff at Ksh.5,000,000, the 4th Plaintiff at Ksh.7,000,000, the 5th Plaintiff at Ksh.3,000,000, the 6th Plaintiff at Ksh.,11,000,000 and the 7th Plaintiff a proposed award of Ksh.5,000,000.
22. On the prayer for a mandatory injunction, the Plaintiffs relied on the case of *Malier Unissa Karim v Edward Oluoch Odumbe [2015]* eKLR where the court held that there was a higher threshold in mandatory than the case in prohibitory injunctions and pray for the order to compel the 1st Defendant to give vacant possession to the Plaintiff.

1st Defendant's Submissions

23. Counsel for the 1st Defendant submitted that the Plaintiffs did not prove that indeed there was encroachment onto their land through a licensed surveyor proving that the 1st Defendant had exceeded the boundary limits of Kyuso Stadium. Consequently, 1st Defendant submits that the plaintiffs have failed to prove that the 1st Defendant through her agents trespassed into the plaintiffs' parcel of land.
24. According to counsel for the 1st Defendant, having failed to prove the claim for trespass, the plaintiffs cannot be entitled to general damages. He also faulted the tenancy agreements produced in court for being incomplete for lack of execution and attestation.
25. Further, counsel for the 1st Defendant submitted that the plaintiffs have not demonstrated which particular sections of their respective titles were encroached into and there is no evidence that the plaintiffs were prohibited by anyone from developing their respective properties and are therefore not entitled to general damages at all and prayed that the suit be dismissed with costs.

Analysis and Determination

26. Having gone through all the pleadings evidence tendered and documents produced by the parties, I opine that the following issues arise for determination:
 - A. Are the Plaintiffs the registered owners of the suit properties?
 - B. Has the 1st Defendant trespassed onto the suit properties?
 - C. What orders should the Court make?
 - D. Who will bear the costs of the suit



A) Are the Plaintiffs the registered owners of the suit properties?

27. The 1st Plaintiff has claimed that he is the legal representative of the estate of Musyoka Mutisya(Deceased) who is the registered proprietor of Land Parcel Kyuso/Kyuso 'A'/307 measuring approximately 35.8616 Ha while the 2nd Plaintiff claims to be the proprietor of Kyuso/Kyuso 'A'/298, the 3rd Plaintiff claims ownership of Kyuso/Kyuso 'A'/305, the 4th Plaintiff claims Kyuso/Kyuso 'A'/306, the 5th Plaintiff claims Kyuso/Kyuso 'A'/297, the 6th Plaintiff claims Kyuso/Kyuso 'A'/294, Kyuso/Kyuso 'A'/296 and Kyuso/Kyuso 'A'/301 and finally, the 7th Plaintiff lays claim to Kyuso/Kyuso 'A'/304.
28. The Plaintiffs have produced their certificates of title, certificates of official search and letters from the Ministry of Lands, Housing and Urban Development confirming their ownership as evidence of proprietorship of the above suit properties.
29. Section 26 of the *Land Registration Act* No. 3 of 2012 provides that a Certificate of title is to be held as prima facie evidence of absolute and indefeasible proprietorship. It states that:
- “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”
30. The 1st Defendant claims that the subject land is fraudulently and illegally registered in the names of the Plaintiffs. Legal authorities abound confirming the legal position that fraud being a quasi-criminal charge must, not only be specifically pleaded but also proved on a standard though below beyond reasonable doubt, but above balance of probabilities. No proof of fraud or illegality was tendered. Therefore, the certificates of title issued to the Plaintiffs herein remain indefeasible without proof that they were acquired illegally, unprocedurally or through a corrupt scheme.
31. It was held by the Court of Appeal in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000]eKLR that:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* [1878] 7 Ch. D 473 at 489.”
32. The Defendant did not call evidence to prove the allegations made in the defence and counterclaim. It follows that the respondent's defence remained mere allegations and the documents filed in the Defendants list of documents have no probative value. That means that not only does the evidence rendered by the plaintiff's stand unchallenged but also that the claims made by the Defendant in his



Defence and Counter-claim are unsubstantiated. The Court of Appeal decided on this issue in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No.23 of 1997 [1997] eKLR, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.

The court went on to state that;

“The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother.”

33. Further it was stated in the case of *CMC Aviation Ltd v Crusair Ltd (NO.1)* [1987] KLR 103 as follows: -

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

) Has the 1st Defendant trespassed onto the suit properties?

34. Section 24 (a) of the [Land Registration Act](#) No. 2 of 2012 provides for the interests a person acquires upon registration of land and states;

“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”

35. Section 25 provides for the rights of such a proprietor and states that;

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

36. Section 152 A of the [Land Act](#) No. 6 of 2012 prohibits unlawful occupation of land and states that “A person shall not unlawfully occupy private, community or public land.”

37. The above rights, interests and privileges accorded to a registered proprietor of land apply to the Plaintiffs in this case having established that they are the proprietors of the suit properties.

38. Black's Law Dictionary 10th Edition at pg. 1642 defines trespass as unlawful acts committed against the person or property of another especially wrongful entry of another's land.

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.”



39. The Plaintiffs claim that the 1st Defendant has erected a fence around the suit properties after placing beacons on the land and that they have been unable to access and use the land. Further the 2nd Plaintiff claims that as a result of the trespass the tenants occupying the houses on his land parcel Kyuso/Kyuso 'A'/298 have vacated due to threats and intimidation and he claims loss of rental income. As evidence of the loss, the Plaintiffs annexed copies of photographs of the trespass. It is noted that the photographs relied upon are faded photocopies which are not clear and the court is thus unable to make out from the photographs clearly the nature of the intrusion. Further the Plaintiffs did not in their evidence explain the structures and/or activities in the said photographs. The same were produced and left to the court to interpret.
40. Be that as it may, the Plaintiffs evidence was that the 1st Defendant invaded the suit parcels of land fenced off the stadium but without any colour of right included in the fencing, the plaintiffs land. That this was done despite court orders thus causing them loss and damage.
41. The 2nd plaintiff stated that the 1st Defendant encroached on his land and dug holes around land to erect a fence which effectively locked out his tenants from accessing their houses. That these activities caused his tenants to move out of the houses due to threats and intimidation. He quantified the loss of rental income at Ksh.100, 000 per month.
42. The 1st defendant in her defence and counterclaim did not deny the allegations of encroachment and fencing of the Plaintiffs land as they were fencing the stadium. The totality of the 1st Defendants defence is that the parcels of land claimed by the Plaintiffs form part of a trust land held by them measuring approximately 31.11 acres.
43. As stated earlier the 1st Defendant did not offer any evidence to justify her claim of ownership of the land and/or the claim that the Plaintiffs acquisition of the land was as stated in the defence. The court thus finds that the 1st Defendants acts of fencing off, entry and encroachment onto the Plaintiffs parcels of land without their consent and failure to give back possession and cease their encroachment amounts to trespass and was unlawful interference with the rights of ownership and possession of the Plaintiffs respective parcels of land.

C) What orders should the Court make?

44. The Plaintiffs submit and rely on the case of *Ajit Bhogal v Kenya Power and Lighting Co.Ltd*[2020] eKLR where the court held that where trespass is proved, a party need not prove that he/she suffered any specific damage or loss to be awarded damages. Counsel stated that the Plaintiffs have been unable to develop and/or commercialize their properties while the 2nd Defendant who had already constructed on his land has suffered loss of income attributed to the 1st Defendants actions.
45. The Court of Appeal dealt exhaustively with considerations for the award of general and compensatory damages. In the case of *Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated))* [2022] KECA 104 (KLR) (4 February 2022) (Judgment) where the Court stated as follows;

The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:i)

- i) Harlburys 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 v 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 v 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.
- iv. *Ephantus Mwangi & Another v Duncan Mwangi* [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence. b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.
- v) *Kiambu Dairy, Farmers Co-operative Society Limited v Rhoda Njeri & 30 Others* [2018] eKLR, - the extend of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.
- vi) *Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited v Janevans Limited* [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss; (b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass; (c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.

46. From the foregoing authority it is clear that the Plaintiffs are entitled to compensation for the offence of trespass to their land by the 1st Defendant and it is only the quantum of such compensation that remains for determination. The Plaintiffs claim loss of use of their land.

47. The claim by the 1st, 3rd to 7th Plaintiffs are similar to the extent that they have not claimed that there were developments on their respective parcels of land and the same will be dealt with together. I note that the said Plaintiffs did not adduce evidence that the 1st Defendant used or destroyed their land.



They further did not adduce evidence of the use and/or activities they had on the land before the encroachment or alternatively what they intended and/or would have used the properties for had they had access. This information would have been useful in determining quantum. Apart from fencing off the land the Plaintiffs do not claim that the 1st Defendant used their land for any specific purpose or activity which may have diminished its value to their detriment. In any event a valuation report on the value of the land prior to the trespass and after the same would have assisted the court in determining the question of whether there was diminution of value of the land.

48. As was held in the case of *Duncan Nderitu Ndegwa v 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.”
49. The court is required to consider such evidence as would show the state of the land prior to the trespass and after and the amount of compensation that would adequately put the Plaintiffs in the position they were in prior to the trespass. An evaluation of case law shows as follows in relation to compensation for trespass to land;
- i) *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR where the defendant had erected a house on the Plaintiffs land the court observed that “The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....” The court awarded a nominal sum of Kshs 100,000/- for trespass.
 - ii) In the case of *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR the court having considered the findings in *Philip Ayaya Aluchio (supra)* awarded general damages in the sum of Kshs 500,000 and stated;

“ A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However as I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only)”
 - iii) In the case of *Johnson Mainga Mogaka v Kenya Power and Lighting Company* [2021] eKLR the court considered the above two cases *Philip Ayaya Aluchio (supra)* stated that;

“ Being duly guided by the above decisions, I award the Defendant damages in the sum of Kshs. 1,100,000/= (One million, one hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”
 - iv) Counsel for the Plaintiff further relied on the case of *Willesden Investments Limited v Kenya Hotel Properties Limited* [2006] eKLR for the award of Kshs 10,000,000 in general damages for trespass to land. However, it is noted that the said award was set aside by the court of appeal in *Kenya Hotel Properties Limited v Willesden Investments Limited* [2009] eKLR.
 - v) The court of appeal in *Kenya Power & Lighting Company Ltd v Ringera & 2 others (supra)* made the following final orders;
 - (a) The award of damages for continuous trespass allowed by the trial court at Kshs.2, 000,000.00 for Eunice and Kshs.4, 000,000.00 for George and Ellah is confirmed.



- (b) The award of compensatory damages awarded to the respondents by the trial court is set aside and substituted with an award of Kshs.6, 000,000.00 for Eunice and Kshs.12, 000,000.00 for George and Ellah.
- vi) It is noted that in the above appeal the trespass to land subject matter of the appeal was a continuing trespass involving erection of powerlines over the Respondents land without consent. Further the portion of land trespassed upon did not revert to the Respondent as the trespasser was not directed to remove the said powerlines.
- vii) The court in arriving at the decision on quantum considers the respective sizes of the different parcels of land the use to which the same was put, if any.

50. The 2nd Plaintiff claims loss of rental income from the houses erected on the suit land Kyuso/Kyuso 'A'/298 in the sum of Kshs 100,000 per month. I do find that evidence has been adduced that there were houses constructed on the land. However, there is insufficient evidence as to the kind of houses they were. Evidence of house plans, approvals from relevant authorities and/or clear photographs would have been useful confirmation of the kind of houses constructed. The 2nd Plaintiff claims that he had taken loans for construction of the same. Evidence to confirm this would have been useful in guiding the court on quantum. Further, the evidence adduced on rental income received by the 2nd Plaintiff is in my view inadequate as the same consists of tenancy agreements only. Receipt of the said income has not been proved. However, I am satisfied that the building claimed to exist on the land does exist since the 1st Defendant did not deny that fact. However the value and the income from the same have not been proved. I am also satisfied that the 2nd Plaintiff was kept away from his property by virtue of the acts of trespass of the 1st Defendant.

51. I have considered the Plaintiffs Counsels submissions on awards of general damages as Kyuso/Kyuso 'A'/307, Kshs 35,000,000/-, Kyuso/Kyuso 'A'/298, Kshs 25,000,000/- Kyuso/Kyuso 'A'/305, Kshs. 5,000,000/-, Kyuso/Kyuso 'A'/306, Kshs. 7,000,000/-, Kyuso/Kyuso 'A'/297, 300,000/-, Kyuso/Kyuso 'A'/294, Kyuso/Kyuso 'A'/296 and Kyuso/Kyuso 'A'/301, Kshs. 11,000,000/-, and Kyuso/Kyuso 'A'/304, Kshs. 5,000,000/-

52. The Plaintiffs have sought orders of permanent injunction restraining the Defendants from the suit property and a mandatory injunction compelling the Defendants to give them vacant possession of the suit properties. In the case of *Bandari Investments & Co. Ltd v Martin Chiponda & 139 others* [2022] eKLR the court dealt with the issue of conditions for grants of mandatory injunctions and stated;

“The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of “*Malier Unissa Karim v Edward Oluoch Odumbe* [2015] eKLR as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “*Giella v Cassman Brown* case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “*Kenya Breweries Ltd v Washington Okeyo* [2002] EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted.



However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application.”

53. Further the same Court of appeal in the case of “Jay Super Power Cash and Carry Ltd v Nairobi City Council and 20 others CA 111/2002” held that: -

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it.”

54. In my opinion, the Plaintiffs have proved their case on a balance of probability and are entitled to the orders sought. I therefore make the following orders;

1. An order be and is hereby issued prohibiting the 1st Defendant or their servants, and agents from dealing and/or carrying out any construction and/or improvements upon the parcel numbers Kyuso/Kyuso ‘A’/307, Kyuso/Kyuso ‘A’/298, Kyuso/Kyuso ‘A’/305, Kyuso/Kyuso ‘A’/306, Kyuso/Kyuso ‘A’/297, Kyuso/Kyuso ‘A’/294, Kyuso/Kyuso ‘A’/296 and Kyuso/Kyuso ‘A’/301 a Kyuso/Kyuso ‘A’/304.
2. A declaration that the Plaintiffs are the rightful owners of the following parcels of land;
 - a) 1st Plaintiff is the proprietor of -Kyuso/Kyuso ‘A’/307
 - b) 2nd Plaintiff is the proprietor of Kyuso/Kyuso ‘A’/298
 - c) 3rd Plaintiff is the proprietor of Kyuso/Kyuso ‘A’/305,
 - d) 4th Plaintiff is the proprietor of Kyuso/Kyuso ‘A’/306,
 - e) 5th Plaintiff is the proprietor of Kyuso/Kyuso ‘A’/297,
 - f) 6th Plaintiff is the proprietor of Kyuso/Kyuso ‘A’/294, Kyuso/Kyuso ‘A’/296 and Kyuso/Kyuso ‘A’/301
 - g) 7th Plaintiff is the proprietor of Kyuso/Kyuso ‘A’/304.
3. A permanent injunction be and is hereby issued restraining the Defendants, their agents, servants and/or assignees or whoever claims under them from interfering with the Plaintiffs quiet possession and/or in any way dealing with and/or trespassing on all those parcels of land known as numbers Kyuso/Kyuso ‘A’/307, Kyuso/Kyuso ‘A’/298, Kyuso/Kyuso ‘A’/305, Kyuso/Kyuso ‘A’/306, Kyuso/Kyuso ‘A’/297, Kyuso/Kyuso ‘A’/294, Kyuso/Kyuso ‘A’/296 and Kyuso/Kyuso ‘A’/301 a Kyuso/Kyuso ‘A’/304.
4. A mandatory injunction be and is hereby issued to compel the Defendants, their agents, servants and assignees or whoever claiming under them to give vacant possession to the Plaintiffs all those parcels of land known as numbers Kyuso/Kyuso ‘A’/307, Kyuso/Kyuso ‘A’/298, Kyuso/Kyuso ‘A’/305, Kyuso/Kyuso ‘A’/306, Kyuso/Kyuso ‘A’/297, Kyuso/Kyuso ‘A’/294, Kyuso/Kyuso ‘A’/296 and Kyuso/Kyuso ‘A’/301 a Kyuso/Kyuso ‘A’/304 within thirty days from the date of this judgement.
5. General damages are awarded as hereunder;



- a) 1st Plaintiff proprietor of land parcel -Kyuso/Kyuso 'A'/307 –Kshs Kshs. 6,000,000/-
- b) 2nd Plaintiff proprietor of land parcel Kyuso/Kyuso 'A'/298, Kshs 4,000,000/-
- c) 3rd Plaintiff proprietor land parcel Kyuso/Kyuso 'A'/305, Kshs 700,000/-
- d) 4th Plaintiff proprietor of Kyuso/Kyuso 'A'/306, – Kshs 1,200,000/-
- e) 5th Plaintiff is the proprietor of Kyuso/Kyuso 'A'/297, Kshs 500,000/-
- f) 6th Plaintiff proprietor of land parcel Kyuso/Kyuso 'A'/294, Kshs. 700,000/- Kyuso/Kyuso 'A'/296, Kshs. 500,000/- and Kyuso/Kyuso 'A'/301, Kshs. 800,000/-
- g) 7th Plaintiff proprietor of Kyuso/Kyuso 'A'/304, 700,000/-
- h) Interest on the above awarded at court rates from the date of judgement.
- i) Costs of the suit are awarded to the Plaintiffs against the 1st Defendant

DATED, SIGNED AND DELIVERED AT KITUI THIS 7TH DAY OF FEBRUARY, 2023.

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

In the presence of:

C/A Moses

Mwalimu C. M. for the Plaintiffs

M/s Ngala holding brief for Mwalimu J. K. for the 1st Defendant

