



**Ndung'u & another (Suing as the Legal Representatives of Ndungu Kahoi) v Kitema & another
(Environment & Land Case 395 of 2015) [2025] KEELC 4563 (KLR) (18 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4563 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 395 OF 2015**

**CG MBOGO, J
JUNE 18, 2025**

BETWEEN

**DORCAS NJERI NDUNG'U 1ST PLAINTIFF
FRANCIS WAWERU NDUNGU 2ND PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF NDUNGU KAHOI**

AND

**JOHNSON NGEMI KITEMA 1ST DEFENDANT
NAIROBI CITY COUNTY 2ND DEFENDANT**

JUDGMENT

1. Following the demise of Ndung'u Kahoi, the plaintiffs filed the amended plaint dated 16th October, 2023 seeking judgment against the defendants for: -
 - a. A declaration to be issued to declare that the plaintiffs are the lawful beneficial owners of the suit property namely Plot Number E2007 B situated in Dandora phase five (5).
 - b. A declaration that the defendant whether by himself or his servants or agent or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly trespassers on the same.
 - c. An order of eviction of the defendant, his servants or agents from the suit property namely plot number E2007 B situated in Dandora phase five (5).
 - d. A permanent injunction restraining the defendant, by himself, his nominees, his agents, servants and/or any other person authorized or purporting to be authorized by him from trespassing on the suit property known as Plot Number E2007 B situated in Dandora phase five (5).



- e. Vacant possession of the suit property.
 - f. General damages for trespass.
 - g. Mesne profits.
 - h. Interest on general damages for trespass and mesne profits from the date of judgment until payment in full.
 - i. Costs of this suit.
2. The gist of the amended plaint is that following an advertisement of plots available in the year 1981, the late Ndung'u Kahoi applied and was allocated a parcel of land known as E2007 B by the defunct City Council of Nairobi. The allocation of the plot was considered a loan where annual payments were made in the year 2013, and the late Ndung'u Kahoi made his final loan payment. Prior to that and in the year 1982, he took vacant possession of the suit property and development the same in the years 1986 and 1987 which he rented out. It was further pleaded that in the year 2011, he was informed that additional structures had been constructed on the suit property, and that it was found that although the records at the City Council indicated that he was the owner, the 1st defendant claimed ownership and was receiving rent from the tenants occupying the suit premises.
 3. The plaintiffs further pleaded that the 1st defendant erected three additional structures on the suit property, and in a bid to safeguard his interests, the late Ndung'u Kahoi, reported the matter to the relevant officers including the police, District Officer and the chief. They contended that despite the above, the 1st defendant continued to trespass on the suit property claiming ownership of the same.
 4. The plaintiffs pleaded particulars of fraud and illegality as follows: -
 - a. Passing off as the owner of the suit property.
 - b. Erecting additional structures onto the suit property without any right or authority and contrary to the limitations imposed by the City Council of Nairobi over the suit land.
 - c. Inviting tenants to occupy the premises thereon without a colour of right or authority.
 - d. Purporting to be the landlord and receiving rent from the tenants in the suit property.
 - e. Engaging in fraud and willful breach of the applicable land laws and due process to purport that he has proprietary interest in the suit property.
 5. The plaintiffs contended that the 1st defendant has no justification to continue collecting rent or developing the suit property at the expense of the rightful beneficiaries.
 6. The 1st defendant filed his defence dated 24th June, 2015. While denying the contents of the plaint, the 1st defendant stated that he is the legal owner of the plot having purchased the same from Richard Macharia Wanjiru who purchased it from the late Ndung'u Kahoi. He stated that he took possession of the same as he only found an empty space with a dilapidated building. Further, that he engaged the deceased to settle the matter amicably but he demanded that all the tenants pay rent directly to him, and that on 13th February, 2013, all the tenants stopped paying rent and vacated the suit property. The 1st defendant contended that he is a purchaser for value and he has massively invested in the same.
 7. The 2nd defendant filed its defence dated 3rd May, 2024. In response to the amended plaint, the 2nd defendant acknowledged that the plaintiff is the owner of the suit property. However, the 2nd defendant denied erecting any structures on the suit property.



8. This matter proceeded for hearing on 19th March, 2025. Francis Waweru Ndung'u (PW1) testified that he is the first-born son of the late Ndung'u Kahoi and that Dorcas Njeri is their step mother. He adopted his witness statement dated 16th October, 2023 as his evidence in chief. He produced the documents contained in the list of documents dated 28th February, 2017 as P. Exhibits Nos. 1 to 9 respectively, and the limited grant contained in the supplementary list of documents 19th March, 2025 as P. Exhibit No. 10. While being referred to the 2nd defendant's documents, he testified that the documents show that his late father was allocated the suit property by the defunct City Council of Nairobi. There was no cross examination and re-examination for this witness.
9. Samuel Wanyoike Ndung'u (PW2) testified that the late Ndung'u Kahoi is his late father. He adopted his witness statement dated 25th September, 2020 as his evidence in chief.
10. John Mwangi Thaa, (DW1) adopted his witness statement dated 6th February, 2025 as his evidence in chief. He testified that according to their records, the late Ndung'u Kahoi is the registered owner of the suit property. He produced the letter of allocation and an internal memo as D. Exhibit nos. 1 and 2 respectively.
11. On cross-examination, DW1 testified that he was instructed by the County Government of Nairobi to testify on its behalf. Further, that the documents he has supplied to the court show that Ndung'u Kahoi is the owner of the suit property. With the testimony of DW1, the 2nd defendant rested its case.
12. Despite the 1st defendant's counsel presence when the matter was called and given time allocation, the 1st defendant failed to prosecute his case, and the same was deemed as closed.
13. The plaintiffs filed their written submissions dated 25th March, 2025 and raised the following issues for determination: -
 - a. Whether this court is empowered to hear this dispute.
 - b. Who are the owners of the suit property.
 - c. Whether the 1st defendant has committed the tort of trespass to land.
 - d. Whether the plaintiffs are entitled to the prayers sought in their amended plaint.
 - e. Who should bear the costs of the suit.
14. On the first and second issues, the plaintiffs submitted that the evidence tendered in court is uncontroverted, and on a balance of probabilities, they have met the required standard of proof. They submitted that this court has jurisdiction to hear and determine this dispute. They further submitted that the evidence produced in court i.e. the letter of allotment and the copies of the receipts is proof that the late Ndung'u Kahoi complied with the terms to confer ownership of the suit property to him. They relied on the case of *Ali Gaddafi & Another v Francis Muhia Mutungu and 2 Others* [2017] eKLR.
15. On the third issue, the plaintiffs submitted that 1st defendant has committed the tort of trespass to land and is obliged to pay general damages. Further, they submitted that they are entitled to mesne profits for depriving them of the user of the suit property. To buttress on this submission, the plaintiffs relied on the cases of *Kenya Hotel Properties Ltd v Willesden Investments Ltd*, Court of Appeal at Nairobi, Civil Appeal No. 146 of 2007, *Wamwea v Catholic Dioceses of Murang'a Registered Trustees* [2003] KLR 389, and *Waas Enterprises Limited v City Council of Nairobi & another* [2014] eKLR.



16. They submitted that in awarding the general damages, Kshs. 500,000- is sufficient compensation for the reason that if the plaintiffs would have utilized the land as they deemed fit, they would have collected rent. Further reliance was placed in the case of John K. Koech v Peter Chepkwony [2019] eKLR.
17. On the fourth and fifth issues, the plaintiffs submitted that they are entitled to the prayers sought and the costs of the suit. The 2nd defendant opted to rely on the submissions of the plaintiffs.
18. I have considered the pleadings filed, the evidence tendered and the written submissions filed by the plaintiffs. In my view, the issue for determination is whether the plaintiffs have made out a case that warrant the grant of the orders sought in their amended plaint.
19. In this case, it was contended that the late Ndung'u Kahoi was the owner of the suit property known as Plot No. E2007 "B" in Dandora Phase 5 which was allocated to him by the 2nd defendant. This was confirmed by DW1 who produced the internal memo dated 22nd February, 2022 and the letter of allotment to the late Ndung'u Kahoi, dated 6th March of a year that is not indicated in the allotment letter. There being no evidence to the contrary, I am satisfied that on a balance of probabilities that the late Ndung'u Kahoi is the owner of the suit property.
20. In their claim, the plaintiffs seek the orders of mesne profits and general damages. While it is clear that the 1st defendant has unlawfully trespassed onto the suit property, and utilized the same to his benefit, it has not been shown through evidence the amounts so far that the 1st defendant has received as rent from the tenants. The rental income derived from the suit property by the 1st defendant is thus unknown to the court, and in the absence of such, this court is unable to award mesne profits. However, and as stated that the 1st defendant trespassed onto the plaintiffs' property, it is my finding that they are entitled to general damages. I would agree that the sum of KES. 500,000- is sufficient in the circumstances.
21. Let me also be quick to point out that it is not within this court's purview to declare whether the plaintiffs are the lawful beneficial owners of the suit property. Their participation in this suit was to prosecute the deceased's case who was the owner of the suit property. This is according to the limited grant ad litem issued on 15th May, 2023.
22. Arising from the above, this court finds that the plaintiffs have on a balance of probabilities discharged the burden of proof, and are deserving of the court's orders. The amended plaint dated 16th October 2023, is hereby allowed as follows: -
 1. The late Ndung'u Kahoi is the lawful owner of the suit property known as Plot Number E2007 B in Dandora Phase 5.
 2. The 1st defendant, whether by himself, his servants or agents is in wrongful occupation of the suit property and he is a trespasser on the same.
 3. An order of eviction is hereby issued against the 1st defendant, and his servants or agents from the suit property known as plot number E2007 B in Dandora phase 5.
 4. A permanent injunction is hereby issued restraining the 1st defendant, either by himself, his agents or servants from trespassing on the suit property known as Plot Number E2007 B in Dandora phase 5.
 5. The plaintiffs are entitled to general damages of KES. 500,000-.
 6. The plaintiffs are also awarded the costs of the suit to be borne by the 1st defendant.

Orders accordingly.



DATED, SIGNED & DELIVERED VIRTUALLY THIS 18TH DAY OF JUNE, 2025.

HON. MBOGO C.G.

JUDGE

18062025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Munyori for the Plaintiff

Mr. Otenyo for the 2nd Defendant

