



REPUBLIC OF KENYA



KENYA LAW
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**Total Kenya Limited v Ngito & 23 others (Environment and Land Case
302 of 2015) [2025] KEELC 5876 (KLR) (16 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 5876 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND CASE 302 OF 2015**

**AK BOR, J
JUNE 16, 2025**

BETWEEN

TOTAL KENYA LIMITED PLAINTIFF

AND

**DANSON G NGITO & 23 OTHERS & 23 OTHERS & 23 OTHERS & 23
OTHERS DEFENDANT**

JUDGMENT

1. The Plaintiff filed the plaint dated 19/2/2009 seeking a declaration that it was entitled to vacant possession and quiet user and occupation of the land known as Embu/Municipality/1198 measuring 0.1075 hectares thereabouts (the suit land). It sought the eviction of the Defendants and other persons trespassing on the suit land, damages for trespass and waste and mesne profits from 1/1/1994 until the date of delivery of vacant possession to the Plaintiff.
2. The Defendants filed a statement of Defence and Counter Claim dated 9/4/2009. The Defendants sought a declaration that they jointly and severally had overriding interests or rights over the suit land. In addition, they sought a declaration that the allocation and issuance of lease over the suit land to J. B. Kitonga and Wallace N. Mantu and subsequent transfer to the Plaintiff was null and void and incapable of conferring any estate interest or right for contravening the provisions of Government Lands Act.
3. The Defendants sought an order for the cancellation of the registration of the Plaintiff's lease over the suit land and a declaration that they are the legal owners of the suit land. Additionally, they sought to have a certificate of lease issued to them or their chosen representative. In the alternative, they sought an order declaring that they had acquired the suit land through adverse possession. They sought a permanent injunction to restrain the Plaintiff or anyone claiming through it from charging, leasing, wasting, trespassing, entering, developing, sub-dividing, occupying and or dealing in any way with the suit land.



4. The Plaintiff's claim was dismissed on 11/10/2018. The hearing of the counterclaim proceeded on 11/3/2025. Stephen Mwangi Ndegwa gave evidence. He stated that sometime in 1949 and 1950, the 24th Defendant and the other Defendants who are the proprietors of the permanent stalls or lock ups within the suit land applied for allocation for a workshop plot in Embu Township as confirmed in acknowledgment dated 14/12/1949. That they were issued with one-year leases which continued to be renewed during the colonial period. The lease stated that it was subject to the provisions and conditions contained in the Native Land Trust Ordinance, 1938 and was also subject to the payment of such compensation as the Provincial Commissioner after consultation with the local Land Board concerned could assess as due in respect of disturbance or any other loss in respect of any private right holding.
5. Mr. Ndegwa told the court that on or about the 19/10/1950, he and other Defendants were allocated a plot for construction of permanent business stalls within the Embu Municipality by the colonial government. Under the terms and conditions of lease, they were to build permanent stalls from where they had been operating their various businesses since 1950 to date. Over the years they paid rent and rates to the Kenya Government and to the Embu Municipal Council as demanded. Further, that since 1950 the Defendants and members of their families had occupied and traded in those plots and had been paying trading licenses to the Embu Municipal Council and the Kenya Government as required.
6. Further, that by virtue of the powers vested in the Governor of the Colony and Protectorate of Kenya by the Native Lands Trust Ordinance 1938, which is now the Trust *Land Act*, the plots comprised in Embu/ Municipality/1198 were alienated by the Governor to the Defendants pursuant to Section 117 (i) of *the Constitution* of Kenya and Section 13 of the Trust *Land Act* (Cap 288) revised in the 1970s.
7. The leases granted to him and the other Defendants by the Governor were for pieces of land at Embu Township in the District of Embu each measuring 32' x 16', described by their own numbers and pointed out by the District Commissioner (DC) with a plan filed in the DC's Office. That they executed the annual leases which were subject to the Native Lands Trust Ordinance 1928, which was repealed and replaced by the Trust *Land Act*. He told the court that he and other Defendants constructed permanent buildings on the plots as required by clause 1 of the Special Conditions and that they had spent substantial amounts of money and had traded from the plots for more than forty years.
8. He maintained that the leases had been automatically extended by virtue of the doctrine of holding over for the several years that they had been in occupation on periodic tenancies. He claimed that they had acquired prescription rights protected by the Lands Trust Ordinance (now repealed) by virtue of the Trust *Land Act* (Cap 288), the Registered *Land Act* (now repealed), *the Constitution* of Kenya and the *Land Registration Act* (Act No 6 of 2012).
9. He stated that on 3/11/1991 in breach of contract, the Commissioner of Lands purported to allocate their pieces of land to J. B Kitonga as an Unsurveyed site for Petrol station measuring 0.1705 hectares for 99 years lease. J. B Kitonga sold the plot to Total (K) Limited, the Plaintiff.
10. That in further breach of contract and the terms of the lease between the Defendants and the Government, the Commissioner of Lands and the County Council of Embu issued a 99-year lease over Embu/ Municipality/ 1198 on 1/1/1994 to the Plaintiff in respect of all that piece of land situated in Embu Municipality measuring 0.1707 hectares (ha) subject to the overriding interests set out in Section 30 of the repealed Registered *Land Act*, which is now Section 28 of the *Land Registration Act*.
11. The Defendants averred that since the colonial period they had built permanent structures in form of lockups/stalls on the suit land. During the pre- independence period they were required to pay annual rents which they paid. That they continued to operate their businesses on the suit land and paid



land rent to the County Government. Mr. Ndegwa maintained that the Defendants' rights as periodic tenancies were protected by Section 30 (d) of the repealed Registered *Land Act* and Section 28 (b), (h) and (j) as well as Section 46 of the *Land Registration Act*.

12. The Defendants came to learn that the suit land had been allocated when they were sued in Nairobi HCCC 656 of 1996 Total Kenya Ltd v Danson Ndito & 23 Others. That was when they learned that the suit land had been allocated to J. B. Kitonga and Wallace Mantu who sold it to the Plaintiff. That suit was withdrawn on 25/6/2003.
13. Mr. Ndegwa produced a copy of the lease granted to Stephen Mbogo Gikono and Joshua N. Kagio for plot No 10.21 to hold for one-year subject to payment of rent of 125/- payable quarterly and the conditions contained in the Native Lands Ordinance of 1938. One of the conditions was for the lessee to provide upon the plot a building or buildings in accordance with plans and specifications approved by the DC. The other conditions were to keep the building in a clean and sanitary condition and not to alienate the land or part of it. The land was granted for purposes of carpentry. The map attached is not clear as to the location of the leased land. The witness also produced photographs showing the buildings and structures erected on the suit land.
14. He produced copies of a single business permit bill issued to Peter Njagi Kaumbuthu dated 2/4/2013 for Kshs 1,100/=; business permit issued by the Embu County Government to Lima Vita Technician; another permit issued to Alois Kathuri Ngugi for plot No 0 in Embu CBD; receipt issued by the Embu County Government to Musee on 29/1/2021 for plot No 1112/82/E15 together with a land bill dated 13/3/2023 issued to Elias Musee for 1112/82/ E15. The witness also produced permits issued to Muthanga Traders in 2013 for plot No. 1112/82/E7 for radio repair together with a permit issued to Aloise Kathuri Ngugi on 20/3/2013 for plot no E24.
15. The copy of the letter of allotment dated 3/11/1994 which Mr. Ndegwa produced indicates that it was issued to Wallace N. Mantu for Embu Municipality 1112/1198 subject to payment of stand premium of Kshs. 77,190/= and acceptance of the offer within 30 days. He produced the form of transfer from J. B Kitonga and Wallace Mantu to Total Kenya Limited on payment of Kshs. 4,500,000/= with the schedule showing the land reference as "Unsurveyed site for a petrol station". He tendered a copy of the certificate of lease issued in the Plaintiff's name of dated 20/11/1995 indicating that the County Council of Embu was the lessor for suit land. The plan attached to the letter of allotment which he produced shows a marked piece of land near the Embu Stadium.
16. He also produced copies of the sale agreement dated 15/9/1995 from J. B Kitonga and Willis N. Mangu to the Plaintiff for Unsurveyed site for petrol station on Embu Mun/1198; the lease for the suit land granted by the County Council of Embu to Total Kenya Limited showing that it was received for registration in 1995. The lease is for 99 years with effect from 1/1/1994 and the land measures approximately 0.1705 ha. The witness produced the Notice of Discontinuance of Suit dated 23/6/2003.
17. Mr. Ndegwa produced copies of minutes of a Special Planning and Works Committee Meeting held on 7/2/1974 where among other sites, it was recommended that the lock up area be planned for better commercial plots. He also produced an illegible copy of the Parliamentary Select Committee Report on Corruption with a schedule showing various plots including Embu Town L.R No. 3360/ XIII with the user indicated as Jua Kali.
18. He produced a copy of the letter dated 4/5/2021 from Hamilton Harrison and Mathews addressed to V. E Muguku Muriu & Co. Advocates relating to Embu HCCC No 12 of 2008- Stephen Mwangi Ndegwa and Others v AG & 30 Others which mentioned the surrender of a lease and invited the latter



firm of advocates to withdraw the suit against Standard Chartered Bank together with a Surrender of lease for Embu Municipality/992.

19. He also produced an acknowledgement of the application for a workshop plot in Embu Township written by the DC, Embu dated 14/12/49 addressed to Benjamin Mathenge Muturi and a letter dated 13/5/1952 from the DC to Benjamin Mathenge Muturi which noted that he had not started building on plot E23 and E24 Township. The letter dated 14/4/1950 from the DC to Benjamin Mathenge Muturi communicated approval of his application for a carpenter's shop and stated that he had been allocated lock up plot numbers 23 and 24. He was required to attend the DC's office to sign the necessary agreement forms.
20. The Health Inspector, Embu district indicated on 29/5/1952 that he had no objection to building works being commenced by B. M Muturi; D. W Kanyenje and Kibiru Kanyi on plot numbers E23 and E24, Embu Township. The DC's letter of 31/5/952 returned a copy of the blueprint for the proposed workshop and required the three persons to conform to the plan exactly. A copy of the DC's letter of 8/10/1954 demanded rent of Kshs 66/= from Benjamin Mathenge for plot No E23 and Kshs 60 for plot No E24 respectively for 1954.
21. The witness also produced receipts dated 31/7/1962 issued by the Colony and Protectorate of Kenya for plot No E23 to Benjamin Mthenge Muturi and another one issued on 12/1/1962 for plot numbers E23 and E24 for payment of Kshs. 24/= and 48/= respectively as well as receipts for conservancy fees issued on 20/7/1963 and 13/9/62.
22. The other documents produced by the Defendants were a business permit issued by the Embu County Government to Lima Vita Technician on 11/4/2022 for plot no. 1112/82/E7 next to Barclays Bank; business permit issued to Ayub Gituma on 29/4/2019 for a Jua Kali plot; business permit issued to Peter Nderitu on 13/5/2022 for a plot near Absa; business permit issued by Embu County Government to Alois Kathuri Ngugi on 8/3/2023 with the address shown as Embu CBD; land bill issued by the Embu County Government on 13/3/23 to Elias Musee for plot no. 1112/82/E15 for Mama Ngina (Blue Valley) for Kshs. 8622.76 and a receipt issued by the Embu County Government to Musee on 29/1/2021 for a payment of Kshs. 37,874.57 for plot no. 1112/82/E15.
23. The witness told the court that on 7/2/1974, the Embu Municipal Council Town Planning and Works Committee passed a resolution that the Jua Kali lock-ups, the subject matter of this suit area, was to be planned for better commercial plots. Further, that on 11/5/2000, the preliminary select committee report on corruption received a report from the Mayor, Town Clerk, Mr. Akungu Provincial Physical Planning Officer and Mr. Kimiywi D. C that the Jua Kali plots occupied by the Defendants had been grabbed and illegally allocated and recommended that they should revert to their original users.
24. The Defendants invited the court to note that when the Plaintiff purported to purchase the suit land there were already permanent structures standing on it owned by the Defendants who were carrying out their businesses on the suit land. It was the Defendants' case that the Plaintiff was recklessly negligent and participated in a fraudulent scheme to try steal a show and dispossesses the Defendants of their rightful interests in the suit land. That it behoved the Plaintiff under the Torrens System of land registration to have not only verified on the ground with the occupants of the property but also all the historical records of the suit land and that the law could not come to its aid to lay claim on the suit land which based on prescriptive rights, had become vested or registered in the Defendants as the proprietors.
25. The Defendants prayed for a declaration that they owned the suit land and that they had an overriding interest under Section 30 (g) of the Registered *Land Act* (now repealed) and Section 28 (b), (h) and (j) of the *Land Registration Act*, Act No 3 of 2012. The Defendants stated that they were claiming



ownership of the suit land by virtue of adverse possession under Sections 7, 37 and 38 of the *Limitation of Actions Act*.

26. On cross examination, Mr. Ndegwa told the court that the Defendants were on the land when the certificate of lease was issued to the Plaintiff.
27. The Plaintiff called its legal officer, Soila Kigera to give evidence in support of its defence to the Defendants' counterclaim. Ms. Kigera told the court that the Plaintiff was registered as lessee of the suit land measuring 0.1705 ha situated in Embu Town for 99 years from 1/1/1994. That it purchased the suit land from J.B. Kitonga and Wallace N. Mantu pursuant to a sale agreement dated 15/9/1995 and a certificate of lease was issued in its name on 20/11/1995 upon the successful registration of the transfer in its favour and that it was the registered owner of the suit land.
28. It was the evidence of Ms. Kigera that the Defendants had trespassed onto the Plaintiff's land and that their continued occupation of the suit land denied the Plaintiff use of its land. Further, that the Defendants had illegally erected structures which they rented out to third parties. She stated that Defendants' actions amounted to acts of waste on the Plaintiff's land and that the Defendants were wrongly benefitting from the land. The Plaintiff's witness stated on cross examination that the Defendants were on the land as trespassers since they did not own the suit land.
29. Parties filed and exchanged written submissions which this court duly considered. In their submissions, the Defendants set out the issues for determination as whether the allocation of the suit land to J. B. Kitonga and Wallace N. Mantu was legal and whether it conferred legal interests in land which could be transferred to the Plaintiff; whether the certificate of lease held by the Plaintiff was protected by law; are the Defendants entitled to claim overriding interests over the suit land; and lastly, whether the Defendants' claim for adverse possession to the suit land could be sustained.
30. The Defendants submitted that it was not in dispute that they had been in physical possession of the suit land for almost 75 years since 1950 after they were granted leases by the colonial administration and put up permanent structures where they carried out their businesses and that they had been paying rates and ground rent to the County Government of Embu. They submitted that on learning of the Defendants' occupation after purchasing the suit land, the Plaintiff offered to pay them a token amount so as to be granted vacant possession of the suit land.
31. The Defendants relied on *Dina Management Ltd v County Government of Mombasa & 5 Others* (Petition 8 (E010 of 2021) (2023) KESC 30 KLR (Constitutional and Human Rights) (21 April 2023) (Judgment) where the Supreme Court referred to various provisions of the Government Lands Act which defined unalienated land and the manner in which it could be allocated. The Defendants maintained that the suit land was not unalienated government land because they held leases under the Native Land Trust Ordinance 1938.
32. They were emphatic that their continued occupation and possession of the suit land since 1950 implied that their leases were renewed from time to time and that this was buttressed by the fact that they had continued to pay rates and ground rent without the national or local county Governments seeking to cancel their leases or evict them from the suit land. They contended that the suit land was not available for allocation to J.B. Kitonga and Wallace Mantu and that by extension, no proper or legal interest could have been transferred to the Plaintiff.
33. The Defendants also urged that even if the suit land was unalienated government land, the Plaintiff could not claim protection of its irregularly and illegally acquired property because it was not a bona fide purchaser for valuable consideration. They urged that the Plaintiff was required to prove that it acquired a valid and legal title over the land; that it carried out the necessary due diligence to determine



the lawful owner from whom it acquired a legitimate title; and lastly, that it paid valuable consideration for the purchase of the suit land.

34. The Defendants cited *Munyu Maina v Hiram Gathia Maina* Civil Appeal No. 239 of 2009 (2013] eKLR, where the court held that if a registered proprietor's root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership, since it was the very instrument that was being challenged and that the registered proprietor needed to go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which did not need to be noted in the register.
35. The Defendants contended that had the Plaintiff done proper due diligence it would have discovered that the Defendants were in actual physical possession and had erected permanent structures which were standing on the suit land many decades ago. The Defendants pointed out that the allotment letter issued to J. B. Kitonga and Wallace Mantu, contained a disclaimer by the Government to the effect that the Government would not accept any liability in the event of prior commitment or otherwise of the land being allocated.
36. On its part, the Plaintiff submitted that it was the registered proprietor of the suit land and that its title was protected by virtue of Section 26 of the *Land Registration Act*. It relied on Sections 30(3) and 35(1) of the same Act on the point that its certificate of lease was prima facie evidence of the matters shown in the certificate and that documents signed by the Registrar are presumed to have been so signed unless the contrary was proved. The Plaintiff relied on *Kimaai v Kirindon Secondary School and Another* [2025] eKLR where the court addressed similar legal provisions.
37. The Plaintiff urged that having produced a copy of its title over the suit land, it proved that it was the owner of the suit land. It cited *Propwa Company Limited v Justus Nyamo Gatondo & Another* [2020] KEELC 3906 (KLR) in support of this contention.
38. The main issue for determination in this dispute is whether the Defendants proved their counterclaim to the suit land on a balance of probabilities. What is at the heart of the counterclaim is whether the Defendants are entitled to claim overriding interests over the suit land and whether the Defendants' claim to the suit land based on the doctrine of adverse possession can be sustained. To determine these questions, the court will have to make a finding as to whether the allocation of the suit land to J. B. Kitonga and Wallace N. Mantu was legal and whether it conferred legal interests in land which could be transferred to the Plaintiff, and consequently, whether the certificate of lease held by the Plaintiff is protected by law.
39. The Defendants claim is grounded on the fact that they are the proprietors of the permanent stalls or lock ups within the suit land having applied for allocation for a workshop plot in Embu Township which was confirmed through the acknowledgment dated 14/12/1949. That pursuant to that, they were issued one-year leases which continued to be renewed during the colonial period. The lease was subject to the provisions and conditions contained in the Native Land Trust Ordinance, 1938 and was also subject to the payment of such compensation as the Provincial Commissioner after consultation with the local Land Board concerned could assess.
40. The Defendants urged that they have occupied and have been running their businesses on the suit land. They relied on the doctrine of holding over and that having been in occupation of the suit land they were periodic tenants. They maintained that the suit land was illegally allocated to J. B. Kitonga and Wallace N. Mantu and that by extension, these persons did not transfer a good title to the Plaintiff.
41. The Defendants base their claim to the suit land on one-year leases which they claimed were renewed in their favour during the colonial period. They pleaded that the leases they held from the colonial



government were subject to the provisions and conditions contained in the Native Land Trust Ordinance, 1938 which was repealed. There is no indication that the Defendants took steps to obtain leases over the land where they carried out businesses after their one leases expired and after Kenya gained independence.

42. The Defendants did not prove the terms under which they currently hold the suit land. They relied on payment of rates and other outgoings to the Embu County Government which were not sufficient to prove the existence of a lease. Payment of trading licenses to the Embu Municipal Council and the Kenya Government as required by the Defendants does not prove their ownership of the suit land.
43. The Defendants did not lead any evidence to prove payment of rent or the terms under which they hold a lease over the suit land and from whom. Without a lease setting out the terms and conditions and by extension a lessor to whom they pay rent to, they cannot possibly be lessees on the suit land. A lot has changed on the land rights regime in Kenya since the 1950's when the Defendants were allocated the suit land to use for carpentry and other businesses. The town and physical planning laws have also changed over time and would have an impact on the use which the suit land should be put into.
44. The Defendants long occupation and use of the suit does not automatically confer ownership rights over the suit land. The Defendants should have taken steps to regularise their claim to the suit land. Land in Kenya is classified as public, private or community land. For the suit land to fall under the realm of private land without the necessary documents of title. As it were, the Plaintiff holds a formal registered lease which was executed by the lessor and sets out the terms under which the lease is held even though the Plaintiff has never gained possession of the suit land. No evidence was led to controvert the fact that the County Council of Embu granted the Plaintiff a suit over the suit land for 99 years from 1/1/1994.
45. The certificate of lease was issued to the Plaintiff in 1995 following a sale of the land by persons to whom the Commissioner of Lands had initially allocated the suit land. This proves that the suit land formed part of public land and was allocated as such. There is no evidence to show that the Defendants applied to be allocated the suit land. It was incumbent upon the Defendants to take steps to formalise their occupation of the suit land by applying for allocation of the suit land under the legal regime applicable post-independence.
46. The Defendants claimed that they were entitled to the suit land through adverse possession or alternatively, that they had acquired prescriptive rights over the land. Section 41(i) of the Limitation of Action Act disentitles anyone from acquiring any title to government land or land vested in the County Council. Based on that provision, the Defendants claim for adverse possession to the suit land or that they have acquired prescriptive rights over the land fails because according to the lease registered in the Plaintiff's name, the suit land is held by the defunct County Council of Embu.
47. Section 5 of the [Land Act](#) gives the forms of tenure as freehold, leasehold, customary land rights or some forms of partial interest. Section 7 of the [Land Act](#) lists the methods of acquisition of title to land as through allocation, land adjudication process, compulsory acquisition, prescription, settlement programs, transmissions, transfers, long term leases exceeding twenty-one years created out of private land and any other manner prescribed in an Act of Parliament.
48. For the Defendants to acquire title to the suit land, they should have pursued one of the methods prescribed by Section 7 of the [Land Act](#). What they seek in the counterclaim is for the court to grant them the suit land, a mandate vested in other entities by law and not on this court. The upshot of this is that the Defendants failed to prove their counterclaim on a balance of probabilities.
49. The court declines to grant the reliefs sought in the Counterclaim. Each party will bear its costs.



DELIVERED VIRTUALLY AT EMBU THIS 16TH DAY OF JUNE 2025.

K. BOR

JUDGE

In the presence of: -

Mr. E. Okoth holding brief for Mr. A. Mahmoud for the Defendants

Ms. H. Njoki holding brief for Ms. W. Murimi for the Plaintiff

Diana Kemboi- Court Assistant

