



**Mueti v Zakayo (Environment and Land Case 212 of 2017)
[2025] KEELC 6660 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6660 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE 212 OF 2017
TW MURIGI, J
SEPTEMBER 25, 2025**

BETWEEN

JOSHUA KYALO MUETI PLAINTIFF

AND

JOSEPH MUTUA ZAKAYO DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a Complaint dated 2nd December 2016 seeking the following orders:
 - a. A declaration that the Defendant, whether by himself, his servants and /or agents, is wrongfully in occupation of the suit property and is accordingly a trespasser on the same.
 - b. A permanent injunction restraining the Defendant, whether by himself, his servants and /or agents or otherwise howsoever, from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the Plaintiff's property known as Plot No. 299 Kinyoo Adjudication Section.
 - c. General damages for trespass.
 - d. Costs of the suit and interest thereon at court rates.
 - e. Any other relief the court deems fit to grant.
2. The Defendant filed a statement of Defence dated 4th August 2020, denying the Plaintiff's claim. He asserted that he is the rightful owner of the suit land, having purchased it in 2008. He urged the court to dismiss the suit with costs and to order the amendment of the records held at the Kinyoo Land Adjudication Office to reflect his ownership.
3. On 8th February 2022, the Defendant was granted leave to issue a Third Party Notice to Isaac Kimanthi Kaula, the Third Party herein.



4. In the Third-Party Notice dated 1st March 2022, the Defendant claimed that the Third Party was obliged to indemnify him with Kshs. 500,000/= if the court determines the suit land belongs to the Plaintiff.
5. The Third Party filed a Defence to the Third Party Notice dated 22nd September 2022 denying the Defendant's claim. He urged the court to dismiss the Defendant's claim with costs.
6. The Defendant filed a reply to the Third-Party's defence dated 14th October 2022, in which he reiterated the contents of his defence and Third-Party Notice.

THE PLAINTIFF'S CASE

7. The Plaintiff, Joshua Kyalo Mueti, testified as PW1 and was the sole witness in support of his case. He adopted his witness statement dated 2nd December 2016 as his evidence in chief. He also produced the documents in his list dated 2nd December 2016 as PEX 1-7.
8. PW1 testified that he is the registered owner of Plot No. 229 Kinyoo Adjudication Section (the suit property herein), having purchased it from Isaac Kimanthi Kaula on 13th September 2011.
9. He informed the court that, following a meeting held on 29th March 2016 regarding the ownership of the suit property, the Assistant Chief for Katune Sub-Location, Sammy K. Kaula, confirmed that he is the rightful owner of the suit property. He went on to state that the Third Party, the previous owner, confirmed in his letter that he had never sold the suit property to the Defendant.
10. He further testified that, sometime in 2016, the Defendant erected a barbed wire fence and began cultivating crops. Concluding his evidence, he urged the court to grant the orders sought in the Plaintiff.
11. On cross-examination by Ms. Gichuki, he reiterated that he purchased the suit property on 13th September 2011 and confirmed that he did not know the Defendant before.
12. He went on to state that after reporting the matter to the local administration and the Third Party, the area Chief and Sub-Chief convened an initial meeting in 2015, during which it was determined that he was the rightful owner of the suit property.
13. That during the second meeting held in March 2016 at the D.O.'s office, the Defendant was present but left early. He testified that the meeting took place before the land was transferred to the Defendant's name. He also stated that he was not aware whether the Third Party owed any money to the Defendant.
14. In re-examination, he reiterated his evidence as above and clarified that he purchased the suit property in 2011 for Kshs 55,000/=.

THE DEFENCE CASE

15. The Defendant, Joseph Mutua Zakayo, testified as DW1 and called three witnesses in support of his case. He adopted his witness statement dated 23rd November 2022 as his evidence in chief. He also produced the documents in his list dated 23/11/2022 as DEX 1 – 6.
16. DW1 testified that on 6th November 2008, the Third Party sold him the suit property for Kshs 47,500. He explained to the court that he had given the Third Party Kshs. 47,500/= to supply him with hides and skins, but he had used the money for his personal expenses.
17. He further testified that it was mutually agreed that this amount would serve as consideration for the suit property and that the Third Party signed a voucher to confirm this agreement. He told the court that after purchasing the suit property, he took possession and began cultivating it. He explained that



- after selling the land to him, the Third Party later sold it to the Plaintiff after three years, who then registered his interest at the Land Adjudication Office. He testified that upon discovering the sale, he submitted the sale agreement, which the chief verified, and the Adjudication Officer recorded his name.
18. He further testified that after the Chief confirmed with the Third party's mother and wife that he had sold the land to him, his name was recorded in the Adjudication Register, and he was subsequently issued a certificate of ownership. He asserted that he is the owner of the suit property, and added that the Third Party should compensate the Plaintiff.
 19. On cross-examination by Ms Gitonga, he reiterated his evidence as above. He testified that the Third Party identified the suit property to him. He further testified that his manager, Francis, prepared the voucher on his behalf in the presence of the Third Party, who subsequently signed it.
 20. He confirmed that he had fenced the suit property and was cultivating thereon. He denied having been summoned by Emali Police Station or by the Chief for any meeting regarding the suit property, and stated that he would have attended if he had been summoned.
 21. According to him, the Plaintiff and the Third Party engaged in fraudulent conduct by allegedly selling and transferring the land.
 22. In the re-examination, he reiterated his evidence as above. He stated that the payment voucher described the suit property as the land near Emali Police Station, while the sale agreement described it as Plot No. 299, Kinyoo Adjudication Section.
 23. He maintained that the sale agreement was signed at Emali in the presence of his colleagues. He stated that the Assistant Chief was from Kakulu Sub-Location within Email Location, and the land is located in Kinyoo, Emali.
 24. He further testified that the remarks on the sale agreement were made 7 years after the sale because he discovered that the plot indicated the name of another person. He explained to the court that the assistant chief was from Malala sub-location, but the suit property is not located there. He stated that he was not aware that the remarks on the sale agreement had been revoked.
 25. He testified that Exhibit 6 was prepared after he presented the Chief's letter, and the adjudication officer then nullified the alternative name and registered him as the owner of the property. He maintained that the Third Party acknowledged that he owed him money.
 26. In re-examination, he explained that the delay in acquiring his ownership documents was occasioned by a dispute between the local government and the farmers cultivating the land. He confirmed that the land adjudication office allowed them to effect transfer after the dispute was resolved in 2015.
 27. DW2 Nicholas Mbithi Zakayo adopted his witness statement dated 23rd November 2022 as his evidence in chief. He testified that the Defendant is his brother, and that the Third Party had previously supplied hides and skins to the Defendant.
 28. He further testified that sometime in 2008, the Third Party received an advance payment from the Defendant to deliver hides and skins, but failed to do so. He went on to state that the Third Party admitted that he had used the money and offered his land as collateral to settle the debt. He confirmed having witnessed the sale agreement dated 6th November, 2011.
 29. He further testified that the Third Party signed an acknowledgment on the petty cash voucher, indicating that he was offering the suit property as compensation instead of refunding the money. He confirmed that the Defendant took possession of the property immediately after the sale.



30. On cross-examination, he testified that they had worked with the Third Party from 2004 to 2020, when he failed to deliver the hides and skins.
31. He further testified that he was aware that the Defendant had given the Third Party money to supply him with hides and skins, and when the Third Party defaulted, he offered the suit land to the Defendant.
32. He also testified that the deceased manager and driver were present when the agreement was recorded in their office on 6th November 2008, and that the manager prepared a petty cash voucher, which the Third Party signed. He confirmed that the petty cash voucher did not specify the plot number but listed the size as $\frac{3}{4}$ acre.
33. DW3 Joseph Mutinda adopted his witness statement dated 23rd November 2022 as his evidence in chief. He told the court that he knew both the Defendant and the Third Party. He further testified that the Defendant was in possession of the suit property, and denied having seen the Plaintiff cultivating on that land.
34. On cross-examination, he testified that the Third Party was his neighbor and confirmed that he had been working for the Defendant as a farmhand since 2009.
35. DW4 Francis Mutua Musumba adopted his witness statement dated 23rd November 2022 as his evidence in chief. It was his testimony that the Third Party would frequently supply the Defendant with hides and skins.
36. He told the court that he knew the Third Party and that they had both received advance payments from the Defendant to buy skins in the past. He also testified that after the Third Party failed to deliver the hides and skins, he offered to reimburse the Defendant with the suit property. He confirmed that the Defendant is currently occupying the property.
37. On cross-examination by Ms. Gitonga, he testified that he had previously worked with the Third Party in the same company, and they would receive advance payments from the Defendant to procure hides and skins.
38. He stated that the Third Party was paid Kshs. 47,500/= in 2004. He also explained that he informed the Defendant about losing the money and proposed settling the debt with a parcel of land, and an agreement was recorded to that effect. He confirmed that he did not witness the signing of the agreement. He also testified that the Defendant began using the land from 2004 until 2019.
39. On cross-examination by Ms. Gichuki, he stated that he could not remember when the Defendant purchased the property or when the Defendant made an advance payment to the Third Party to procure the hides and skins.
40. In re-examination, he confirmed that he was not present when the Defendant purchased the land.

THE THIRD PARTY'S CASE

41. The Third Party, Isaac Kimanthi Kaula, adopted his witness statement dated 5th June 2024 as his evidence in chief.

He confirmed that he sold the suit property to the Plaintiff vide a sale agreement dated 13th September 2011 and that his family consented to the sale.
42. On cross-examination, he testified that he does not know the Defendant personally, but used to see him at Emali market. He denied selling the suit property to him. He told the court that he is illiterate and



denied the signature appearing on the sale agreement dated 13th September 2011 (PEX 1), but admitted that the thumbprint was his. He also denied the signature appearing on the agreement between the family of Kaula Katika and Joshua Kyalo (PEX 3) but admitted that the thumbprint was his. He also admitted that his mother and wife signed the sale agreement with the chief's remarks (DEX 3) and added that he did not instruct them to sell the land to the Defendant.

43. He further testified that he did not report the sale agreement to the police as illegal. He added that the Defendant had never been in possession of the land.
44. In re-examination, he confirmed that he had signed the sale agreement between himself and the Plaintiff, but denied signing the petty cash voucher and added that the Defendant had never possessed the suit property.
45. After the close of the hearing, parties agreed to file and exchange their written submissions.

THE PLAINTIFF'S SUBMISSIONS

46. The Plaintiff filed his submissions dated 24th February 2025. On behalf of the Plaintiff, Counsel outlined the following issues for the court's determination:-
 - a. Which of the two sale agreements over the suit property is valid and enforceable in law?
 - b. Whether the Plaintiff is the legal and rightful owner of the suit property;
 - c. Whether the Defendant is a trespasser on the suit property; and
 - d. Whether the Plaintiff is entitled to the prayers sought.
47. On the first issue, Counsel submitted that the right to enforce an interest over land is based on Section 3(3) of the Law of Contract Act and Section 38 of the Land Act.
48. Counsel relied on the case of *Kunya & 2 Others vs Global Trucks Limited* (ELC Case No 63 of 2021 [2023] KEELC 18605 (KLR) (6 June 2023) to submit on the conditions of a valid sale agreement.
49. Counsel argued that although PEX 1 and DEX 1 are both written documents, the Third Party denied signing DEX 1 because his thumbprint was missing. Counsel submitted that the alleged signature of the Third Party was not witnessed, and the document lacked the full names of the parties, detailed information about the suit property, and any specified conditions or obligations. Counsel contended that PEX 1 demonstrates the document's validity and enforceability under the law.
50. Regarding the second issue, Counsel submitted that the Defendant relied on DEX 2, 3, and 4 to assert that the suit land was offered to him as a settlement for a debt owed by the Third Party. He alleged that he had given money to the Third Party, but the third party failed to supply hides and skins, and consequently, the land was given to him as settlement for the debt. Counsel contended that this position was not only refuted in PEX 4, 5, and 6, and the Third Party's testimony, but it is also implied in the contradicting testimonies of DW2 and DW4.
51. Counsel urged the court to find that the Defendant was an unreliable witness. It was argued that the discrepancies in the Defendant's testimony undermined the overall defense case. To buttress this argument, reliance was placed on the case of *Anyona v. Wells Oil Limited & 2 Others* (Civil Appeal E091 of 2022) [2023] KEHC 26833 (KLR).
52. Counsel submitted that although the court was presented with two certificates of ownership over the suit property, PEX2 has a landline while the one appearing on DEX5 is a personal line. Counsel pointed out that although both documents appear to be signed by the same officer, A.M. Maithya, his signature



- on DEX5 is different from the one on PEX2. Counsel argued that the official stamp on DEX5 differs from the one on PEX2, which resembles the stamp on DEX6—an unsigned document stamped two months after DEX5. Based on the foregoing, Counsel urged the court to find that DEX5 was a forgery.
53. Counsel invoked the doctrine of first registration outlined in Section 23 of the Registration of Titles Act (repealed) to persuade the court not to interfere with the Plaintiff's proprietary rights. To support this argument, reliance was placed on the case of *Joseph Arap Ngok v. Justice Moijo Ole Keiwua*, Nairobi Civil Application No. 60 of 1997.
 54. On the indefeasibility of the Plaintiff's title as the first registered proprietor of the suit property, Counsel relied on the case of *Kanu vs Cabinet Secretary Ministry of Lands & Physical Planning & 5 Others ELC Petition E025 of 2020 [2024] KEELC 4563 (KLR) (3 June 2024) (Judgment)* and urged the court to find that the Plaintiff is the legal and indefeasible owner of the suit property.
 55. Regarding the third issue, Counsel submitted that the Plaintiff had proved that he is the lawful and indefeasible owner of the suit land. It was submitted that the Defendant's acts of erecting a fence and cultivating on the suit property without the Plaintiff's consent constituted trespass, as defined under Section 3 of the *Trespass Act*.
 56. Counsel argued that the Plaintiff had proved his right to exclusive possession of the suit property, thereby justifying a declaration that the Defendant is a trespasser on the suit property. To buttress this point, reliance was placed on the case of *Silantoi Ene Santa Nkoipiyia & Another vs Natasha Ene Santa Ngopia [2021] eKLR*.
 57. Counsel submitted that Section 13, as read together with Section 26 of the *Land Adjudication Act*, requires anyone with a land claim within an Adjudication Section to file an objection, and if dissatisfied with the resulting decision, they are required to appeal to the Minister in accordance with Section 29 of the Act.
 58. According to Counsel, the Defendant did not adduce any evidence that he filed an objection or an appeal, which suggests he is a trespasser. As a result, the Plaintiff is entitled to an injunction to protect his property rights.
 59. Counsel further submitted that the Plaintiff had met the threshold for granting a permanent injunction against the Defendant.
 60. Regarding damages for trespass, Counsel cited the case of *Fleetwood Enterprises vs KPLC [2015] eKLR* to argue that this remedy is at the court's discretion. Counsel further argued that once trespass is established, the affected party is not required to demonstrate that it suffered damage or loss to be awarded damages.

ANALYSIS AND DETERMINATION

61. Having considered the pleadings, the evidence on record, and the submissions by the parties, the only issue that arises for determination is whether the Plaintiff is entitled to the orders sought.
62. The Plaintiff is seeking a declaration that the Defendant is a trespasser on the suit property. Black's Law Dictionary, 10th Edition defines trespass to land as follows;

“A person's unlawful entry on another's land that is visibly enclosed.”



63. In the case of *Municipal Council of Eldoret Vs Titus Gatitu Njau* (2020) eKLR, the Court of Appeal cited the case of *M'Mukanya Vs M'Mbijiwe* (1984) KLR 761, where the ingredients of the tort of trespass were stated as follows;
- “Trespass is a violation of the right to possession, and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land, which is different from ownership, see *Thomson v Ward* (1953) 2 QB 153.”
64. To establish trespass, the Plaintiff must prove that he is either lawfully in possession of the suit property or the owner, and that the Defendant entered the property without any justifiable cause. In the case of *Gitwany Investments Limited vs Tajmal Limited & 3 Others* [2006] eKLR, the Court held that title to land carries with it the right to legal possession. This means that even if one does not have actual possession of the land, as long as they have a title to the land, it is deemed to be possession for the purposes of trespass.
65. The Plaintiff contends that he is the lawful owner of the suit property, having purchased it from the Third Party. In this regard, the Plaintiff produced a sale agreement dated 13th September 2011, between himself and the Third Party. The sale agreement pertains to L.R. 299 located within the Emali Sub-Location. The purchase price is indicated as Kshs.45,000/=. The sale agreement is signed by both the Plaintiff and the Third Party in the presence of the guarantor, family members, and witnesses. In addition to his signature, the Third Party appended his thumbprint, and witnesses attested their signatures.
66. The Plaintiff also produced an agreement between himself and the Kaula Kitaka's family dated 13th September 2011. In the agreement, the family acknowledges that the suit land was sold to the Plaintiff for Kshs. 55,000/=. The agreement indicates that the mother and wife of the Third Party consented to the sale of the suit land to the Plaintiff.
67. Both the Plaintiff and the Third Party's family members signed the agreement confirming that the suit property belongs to the Plaintiff. He also produced a commitment of sale of land dated 3rd December 2015, in which the Third Party confirms having sold the suit property to him. The Third Party denied having sold the land to the Defendant.
68. Additionally, the Plaintiff produced a letter from the Chief revoking his previous letter dated 23rd September 2015. The Plaintiff also produced a certificate of ownership, dated 18th May 2015, for Plot No. 299, Kinyoo Adjudication Section. In a letter dated 29th March 2016, the Chief confirmed that the land belongs to the Plaintiff.
69. On his part, the Defendant produced a sale agreement dated 6th November 2008, between himself and the Third Party for plot No. 299. The purchase price is indicated as Kshs 47,550/=. Subsequently, on 8/09/2015, witnesses attested the sale agreement in the presence of the Chief. In the sale agreement, the Third Party authorized the Makueni County Council/Land Adjudication Officer to transfer the property to the Defendant. The Defendant also produced a petty cash voucher as evidence of payment of the purchase price. DW2 confirmed that the Third Party signed the voucher in his presence.
70. Additionally, the Defendant produced the sale agreement endorsed by the Chief, who confirmed that they had observed the suit property. The remarks on the sale agreement were made in the presence of the Third Party's mother and wife, who signed accordingly. He also produced a certificate of ownership dated 29th September 2015, along with a record of the details.



71. The Third Party denied selling the suit property to the Defendant. It was his testimony that he did not know the Defendant personally and only used to see him in Emali town.
72. Section 3(3) of the Law of Contract provides as follows;-
- No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
73. This provision is echoed in Section 38 of the *Land Act*, 2012, which stipulates that no interest in land can pass unless there is a valid contract of sale. It provides as follows: -
- (1) Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land unless—
 - (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
74. It is not in dispute that the sale agreement between the Third Party and the Defendant is in writing. However, the Third Party denied signing the sale agreement. It was submitted that the sale agreement did not have the Third Party's thumbprint. There is no requirement that parties must append both their signatures and thumbprints. The requirement is that the agreement must be signed. According to the land sale commitment dated 3rd December 2015, the Third Party acknowledged owing money to the Defendant. He signed the land sale commitment and affixed his thumbprint.
75. DW2 confirmed that the Third Party executed the sale agreement. They confirmed that the Third Party was paid upfront to supply hides and skins, but after failing to deliver, he proposed to offset the debt with his land.
76. His claim that he is illiterate is unconvincing. The sale agreement between himself and the Defendant clearly shows that he signed and affixed his signature. There is no evidence that he reported to the police that the sale agreement between himself and the Defendant was a forgery. The court can safely conclude that the Third Party is capable of writing.
77. It is not in dispute that the Defendant is in occupation of the suit property. This confirms that he took possession of the suit property after purchasing it.
78. Based on the evidence on record, I find that the Third Party used his land as collateral to settle the debt owed to the Defendant.

Having acknowledged that he sold the suit property to the Plaintiff, he may indemnify him accordingly.



79. The Plaintiff also seeks a permanent injunction restraining the Defendant from interfering with the suit property. Based on the evidence on record, I find that the Plaintiff has not established a prima facie case to warrant the grant of the orders sought.
80. In the end, I find that the Plaintiff has not proved his case on a balance of probabilities against the Defendant as required.
81. The upshot of the foregoing is that the Plaintiff's suit is hereby dismissed with costs.

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HON. T. MURIGI

JUDGE

JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER, 2025.

In the presence of: -

Ms. Kavita holding brief for Ms Gichuki for the Defendant

Ms. Gitonga holding brief for Nzaku for the Plaintiff

Ahmed – Court assistant

