

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL SUIT NO. 162 OF 2008**

**AMPANI LEKAKENY .....**  
**.....PLAINTIFF**

**VERSUS**

**1. OLE CHESUSUA KIPTIT**  
**2. EMMANUEL OREU KITIARAP**  
**3. WILSON KITIARAP CHESUSUA**  
**4. LEPARAN DICKLACK KITIARAP**  
**5. JOEL ORAMAT KITIARAP .....**  
**....DEFENDANTS**

**JUDGMENT**

**A. Introduction**

1. This suit concerns an allegation of trespass to land known as **TRANSMARA/SHARTUKA/943**. The Plaintiff, Mr. Ampani Lekakeny, avers that he is the registered proprietor of the said parcel of land, measuring 22.15 hectares, and situated within Transmara, Narok County.
2. According to the Plaintiff, in or about May 2007, the Defendants unlawfully entered upon his land, constructed houses and other structures, cultivated crops, and progressively expanded their occupation from an initial 10 acres to cover the entire parcel. He contends that such entry was without any colour of right, licence, or legal justification.
3. The Defendants, led by the 1<sup>st</sup> Defendant, Mr. Ole Chesusua Kiptit, deny the claim in its entirety. They assert that they occupy a different parcel, namely **TRANSMARA/SHARTUKA/166**, which is registered in the name

of the 1<sup>st</sup> Defendant, and not the Plaintiff's parcel 943.

4. It is common ground that the Plaintiff and the 1<sup>st</sup> Defendant were both members of a former group ranch in the Shartuka area, which was subsequently subdivided among members, giving rise to multiple individual parcels including the two in question.
5. The Defendants had raised the plea of *res judicata* based on **Kisii HCCC No. 85 of 2005**, in which the 1<sup>st</sup> Defendant sued the present Plaintiff for eviction from parcel 166 and obtained judgment in his favour. The Plaintiff maintains that the parcels are distinct and that the present claim is not barred.
6. This court, in a ruling dated **16<sup>th</sup> June 2009** by Musinga J (as he then was), determined that the suit was not *res judicata*, noting that parcels 943 and 166 appeared prima facie to be different parcels on different map sheets, and allowed the matter to proceed to hearing.

#### **B. The Plaintiff's Case**

7. The Plaintiff's claim is contained in the Plaint dated **19<sup>th</sup> November 2008**. He asserts that he is the absolute and indefeasible owner of **TRANSMARA/SHARTUKA/943**, having been so registered on **14<sup>th</sup> August 1998**. He produced in evidence a title deed and a green card in respect of the parcel.
8. The Plaintiff's evidence is that the suit property measures **22.15 hectares** and is recorded on Registry Map Sheet No. 2. He emphasizes that the Defendants' parcel 166 measures **20.64 hectares** and is recorded on Registry Map Sheet No. 1, hence the two parcels are separate and distinct.
9. He avers that in May 2007, the Defendants wrongfully entered his land, erected houses, planted crops, and initially occupied about **10 acres**. Over time, they allegedly extended their occupation to the entire parcel, thereby depriving him of possession and enjoyment.

10. The Plaintiff denies any connection between parcel 943 and parcel 166. He points out that the Defendants previously made an application dated **13<sup>th</sup> February 2009** alleging that the two parcels overlapped, but the court declined to grant orders, finding that the parcels were different.
11. He further submits that the orders made in Kisii HCCC No. 85 of 2005, which related to parcel 166, do not apply to the present dispute over parcel 943. According to him, he and the Defendants reside far apart, and their occupation of his parcel has rendered him landless and forced him to live on his brother's land.
12. The Plaintiff therefore prays for an order of eviction against the Defendants, a permanent injunction restraining them from entering or trespassing onto parcel 943, mesne profits for the period of occupation, and costs of the suit.

### **C. The Defendants' Case**

13. The Defendants filed a joint defence dated 15<sup>th</sup> January 2009, denying all allegations of trespass. Their case is that they occupy **TRANSMARA/SHARTUKA/166**, which is registered in the name of the 1<sup>st</sup> Defendant, and that parcel 943, as described by the Plaintiff, either does not exist on the ground or has not been shown to be distinct from parcel 166.
14. They contend that the Plaintiff has failed to prove the physical existence and location of parcel 943, and that mere production of a title deed is insufficient. They submit that such proof requires expert surveyor evidence, including registry index maps, to establish the boundaries and location of the parcel on the ground.
15. The Defendants rely heavily on the judgment in **Kisii HCCC No. 85 of 2005**, in which the 1<sup>st</sup> Defendant obtained eviction orders against the present Plaintiff from parcel 166. They note that in his defence in that case, the Plaintiff alleged that parcel 166 was

part of parcel 943, but the court found that the Plaintiff's lawful holding was **TRANSMARA/SHARTUKA/36**, not 943.

16. They produced certified copies of the judgment and proceedings in the 2005 case, a certificate of official search for parcel 166 showing the 1<sup>st</sup> Defendant as proprietor, and a certificate of official search for parcel 36 showing the Plaintiff as proprietor.
17. Their position is that without surveyor evidence, the Plaintiff has failed to discharge the burden of proof under Section 107 of the Evidence Act, and that his claim should be dismissed with costs.

#### D. Hearing of the Matter

18. Following the dismissal of the Defendants' preliminary objection on *res judicata* by the Ruling of Musinga J on **16<sup>th</sup> June 2009**, the matter proceeded to full hearing. Both the Plaintiff and the Defendants adduced oral evidence in support of their respective cases, and documentary exhibits were tendered.
19. The Plaintiff testified on his own behalf, relying on the title deed and green card for parcel 943, and reiterated his assertion that the Defendants had unlawfully occupied his land since 2007. He maintained that parcel 943 is distinct from parcel 166, referring to their respective acreage and map sheet numbers.
20. The Defendants, through the 1<sup>st</sup> Defendant and other witnesses, maintained that they occupy parcel 166 and have no dealings with parcel 943. They produced searches, past court judgments, and orders relating to parcel 166, and emphasised that the Plaintiff has not shown, by surveyor's report or registry map, where parcel 943 is located.
21. After the close of the oral hearing, the parties filed written submissions. The Plaintiff's submissions were filed by **C.A. Okenye & Co. Advocates** and dated 28<sup>th</sup> June 2017. The Defendants' submissions were filed by **Asati, Anyona & Co. Advocates** and are dated **14<sup>th</sup> July 2017**.

a) **Plaintiff's Submissions**

22. The Plaintiff submitted that he had proved his case on a balance of probabilities, demonstrating that he is the registered owner of parcel 943. He argued that the Defendants are trespassers and that their contention that parcel 943 overlaps parcel 166 was baseless, given that both parcels were registered on the same date but appear on different map sheets with distinct acreages.
23. He further pointed to the earlier dismissal of the Defendants' 2009 application as confirmation that the two parcels are different. He dismissed the relevance of the decision in Kisii **HCCC No. 85 of 2005**, asserting that it related to parcel 166 and not the present suit land. On that basis, he urged the Court to enter judgment as prayed in the Plaint, granting eviction, permanent injunction, mesne profits, and costs.

b) **Defendants' Submissions**

24. The Defendants submitted that the Plaintiff had failed to prove the physical existence of parcel 943 on the ground or to demonstrate that the land they occupy is the same as parcel 943. They argued that in law, the burden of proof lay with the Plaintiff under Section 107 of the Evidence Act, and that he had not discharged it. They stressed that without a surveyor's report and a Registry Index Map showing the location and boundaries of parcel 943, the Plaintiff's evidence was incomplete and insufficient.
25. The Defendants also revisited the proceedings in Kisii HCCC No. 85 of 2005, contending that in that case, the Plaintiff himself had claimed that parcel 166 was the same as parcel 943, but the court found that his lawful parcel was parcel 36. They maintained that their occupation is of parcel 166, not 943, and that trespass had not been proved. They therefore prayed for dismissal of the suit with costs.

## E. Issues for Determination

26. Having considered the pleadings, the evidence on record, and the submissions of counsel, the following issues arise for determination:

- a) Whether parcel **TRANSMARA/SHARTUKA/943** exists on the ground and is distinct from parcel **TRANSMARA/SHARTUKA/166**.
- b) Whether the Defendants have trespassed onto parcel **TRANSMARA/SHARTUKA/943**.
- c) Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff, namely eviction, injunction, mesne profits, and costs.
- d) Who should bear the costs of this suit.

**Issue 1: Whether parcel TRANSMARA/SHARTUKA/943 exists on the ground and is distinct from parcel TRANSMARA/SHARTUKA/166**

27. The Plaintiff's position is that he is the registered proprietor of parcel **TRANSMARA/SHARTUKA/943**, measuring 22.15 hectares, situated on Registry Map Sheet No. 2. He produced in evidence a title deed and a green card to that effect. He contends that this parcel is separate and distinct from parcel **TRANSMARA/SHARTUKA/166**, which measures 20.54 hectares, is recorded on Registry Map Sheet No. 1, and is registered in the name of the 1<sup>st</sup> Defendant.

28. The Defendants dispute the physical existence of parcel 943 on the ground, arguing that the Plaintiff has failed to prove its actual location and boundaries. Their case is that the land they occupy is parcel 166, which has been the subject of previous litigation in **Kisii HCCC No. 85 of 2005**. They rely on the finding in that case that the Plaintiff's lawful holding is parcel **TRANSMARA/SHARTUKA/36**, and contend that the Plaintiff has

not shown otherwise.

29. The Court's ruling of **16<sup>th</sup> June 2009** already determined that, prima facie, the two parcels appear to be different, based on registry particulars. The ruling noted that parcel 943 is on Map Sheet No. 2 with an acreage of 22.15 hectares, while parcel 166 is on Map Sheet No. 1 with an acreage of 20.64 hectares, and that the connection between them "has not been established." That ruling did not, however, make a conclusive finding on the ground location, leaving the matter for determination at trial.

30. Upon considering the titles and registration records produced in this case, I note that parcel **166** was registered on **14<sup>th</sup> August 1998** and parcel **943** was registered later on **24<sup>th</sup> September 2003**. Both titles show different acreages in the registry. However, from my examination of the map available in the evidence, the two parcels appear to refer to the same piece of land on the ground, but bearing different numbers. This raises serious questions as to whether the Plaintiff's title relates to a physically separate parcel or is in fact a later-issued title over the same ground as parcel 166.

31. Under **Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya**,

*"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

32. Section 108 of the [Evidence Act](#) also stipulates as follows: -

*"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."*

33. Further, Section 109 of the [Evidence Act](#) stipulates that: -

*"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is*

*provided by any law that the proof of that fact shall lie on any particular person.”*

34. In addition, Section 110 of the [Evidence Act](#) provides that: -

*The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.*

35. Therefore, the burden lies with the Plaintiff to prove both the existence of parcel 943 on the ground and that it is distinct from parcel 166.

36. The physical existence of a parcel of land in a boundary or ownership dispute is typically proved by producing the **Registry Index Map (RIM)** for the area, or by calling expert survey evidence. Such evidence can confirm whether two registry entries refer to distinct physical parcels or whether one overlaps or corresponds with the other.

37. In the present case, while the Plaintiff produced the title deed and green card for parcel 943, he did not produce the RIM for Shartuka registration section, nor did he call a surveyor to testify to the ground location of parcel 943 and its relation to parcel 166. Without such evidence, the Court cannot conclusively determine whether the parcel exists as a distinct location on the ground.

38. On the other hand, the Defendants produced a certificate of official search for parcel 166 in the name of the 1<sup>st</sup> Defendant and relied on the previous judgment in Kisii HCCC No. 85 of 2005, in which the court found that the Plaintiff was not the owner of parcel 166 and that his lawful parcel was number 36. While that finding does not prove that parcel 943 does not exist, it underscores the need for precise survey evidence to distinguish the two.

39. In **Munyu Maina v. Hiram Gathiha Maina [2013] eKLR**, the Court of Appeal held that

*“We have stated that when a registered proprietor’s root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”*

40. This principle applies here: the Plaintiff’s production of a title deed is not, on its own, sufficient to discharge the evidential burden in the face of the Defendants’ challenge, especially where the map suggests the two parcels may be one and the same on the ground.

41. In light of the above, I find that the Plaintiff has established the existence of parcel 943 in the land registry records but has not provided sufficient evidence to prove its actual physical location on the ground or to distinguish it conclusively from parcel 166. The absence of survey evidence or RIM maps leaves a critical evidentiary gap.

**Issue 2: Whether the Defendants have trespassed onto parcel TRANSMARA/SHARTUKA/943**

42. The Plaintiff’s claim for trespass is anchored on his assertion that the Defendants unlawfully entered upon and occupied part of parcel **TRANSMARA/SHARTUKA/943** in May 2007, later extending their occupation to the entire parcel. He alleges that the Defendants have put up houses, cultivated crops, and continue to interfere with his possession.

43. The Defendants deny any entry or occupation of parcel 943. Their consistent position, both in pleadings and evidence, is that they occupy parcel **TRANSMARA/SHARTUKA/166**, which

belongs to the 1<sup>st</sup> Defendant, and which was the subject of **Kisii HCCC No. 85 of 2005**. They assert that they have been in continuous occupation of parcel 166 as their homestead, pursuant to lawful ownership, and have no presence on parcel 943.

44. In Clerk and Lindasell on Torts 18<sup>th</sup> Edition at Paragraph 18 defined **“Trespass”** as follows; -

*“An unjustifiable entry by one person upon the land in possession of another”*

45. Similarly, I concur with the considered view of Samson Okongo, J in **Zacharia Onsongo Momanyi -vs- Evans Omurwa Onchagwa (2014) eKLR** that the tort of trespass is actionable per se and that, -*“Trespass has been defined as any unjustified intrusion of one person upon the land in possession of another”*

46. From these definitions, to succeed in an action for trespass, the Plaintiff must prove, on a balance of probabilities, first, that (s)he is either the bona fide owner or proprietor of the suit property or that (s)he is in or entitled to immediate possession of the suit of the suit property or both; and second, that the sued party has intruded and/or occupied and/or remained in the suit property without any justifiable cause.

47. The Court of Appeal in **M’Mukanya vs. M’Mbijiwe (1984) KLR 761**, Kneller JA (as he then was) explained the ingredients of trespass as follows:

*“He has to prove on the balance of probabilities M’Mukanya and Nyamu entered on this plot when it was in his possession. He must show he had the right to immediate possession and entered in exercise of it and then he will be said to have been in possession of it ever since he had that right. This tort is a violation of the right of possession and M’Mbijiwe must prove he, and not M’Mukanya and Nyamu, had the right to immediate and*

*exclusive possession of it which is different from ownership.”*

48. Applying those principles to this case, two critical matters must be established by the Plaintiff: (a) that parcel 943 exists as a distinct parcel on the ground and he is entitled to immediate possession; and (b) that the Defendants have physically entered and remained upon it without lawful justification.
49. From the findings under Issue 1, while the Plaintiff has demonstrated that parcel 943 is recorded in the land registry, he has failed to prove its actual physical location or to distinguish it conclusively from parcel 166. The map evidence suggests that the two parcels may in fact refer to the same land on the ground, but with different registration numbers.
50. The Plaintiff did not present surveyor evidence or produce a Registry Index Map overlay to match the boundaries of parcel 943 against the area the Defendants occupy. Without such technical evidence, the Court cannot conclude, on a balance of probabilities, that the Defendants' homesteads or cultivated areas lie within the boundaries of parcel 943 rather than parcel 166.
51. The Defendants, on the other hand, produced a certificate of official search confirming their registered ownership of parcel 166 and relied on the prior judgment in **Kisii HCCC No. 85 of 2005**, in which the Plaintiff's claim to parcel 166 was rejected. This evidence supports their position that their occupation is lawful and confined to their own parcel.
52. In the absence of proof that parcel 943 is a separate parcel on the ground and that the Defendants' occupation falls within it, the allegation of trespass cannot be sustained. The uncertainty regarding the true identity of parcel 943 vis-à-vis parcel 166 is fatal to the Plaintiff's claim.

53. I therefore find that the Plaintiff has failed to prove, on a balance of probabilities, that the Defendants have trespassed upon parcel **TRANSMARA/SHARTUKA/943**.

### **Issue 3: Whether the Plaintiff is entitled to the reliefs sought in the Plaint**

54. The Plaintiff's prayers are for: Eviction of the Defendants from parcel **TRANSMARA/SHARTUKA/943**; A permanent injunction restraining the Defendants from entering or trespassing onto the said parcel; Mesne profits; and Costs.

55. As established under Issues 1 and 2, while the Plaintiff has proved that parcel 943 exists in the land registry records, he has not proved its actual physical location or that it is distinct from parcel 166. Most importantly, he has not proved that the Defendants have entered or are in occupation of parcel 943.

56. In law, a claim for eviction and injunction must be grounded upon proof that the defendant is unlawfully in possession or occupation of the plaintiff's land. In **Kenya Power & Lighting Co. Ltd v. Sheriff Molana Habib [2018] eKLR**, the Court held that an injunction will not issue unless the plaintiff shows a clear and enforceable right that is under threat.

57. Since the Plaintiff has not established that the Defendants are on parcel 943, there is no evidential foundation for the grant of an eviction order or a permanent injunction. Granting such reliefs in the absence of proof would be contrary to the principles of justice and fairness.

58. On mesne profits, the law is clear under **Section 2 of the Civil Procedure Act** that they are payable for wrongful occupation of property. Without proof of trespass, the claim for mesne profits must equally fail.

59. Consequently, I find that the Plaintiff is not entitled to any of the substantive reliefs sought in the Plaintiff.

#### **Issue 4: Who should bear the costs of the suit**

60. The general rule under **Section 27(1) of the Civil Procedure Act** is that costs follow the event, unless the court, for good reason, orders otherwise.

61. In this case, the Plaintiff's claim has failed for want of proof. Ordinarily, this would justify an award of costs to the successful party, the Defendants. However, the history of this dispute, including the prior litigation between the same parties and the earlier ruling on *res judicata*, demonstrates that the matter has been contentious for many years.

62. In the interests of promoting finality and reducing hostility between the parties, I find it appropriate to order that each party shall bear their own costs.

#### **Final Orders**

63. In the result, and having carefully considered the pleadings, the evidence, the submissions of counsel, and the applicable law, the Court makes the following final orders:

a) The Plaintiff has failed to prove, on a balance of probabilities, that the Defendants have trespassed upon land parcel **TRANSMARA/SHARTUKA/943**.

b) The Plaintiff's suit dated 19<sup>th</sup> November 2008 is hereby **dismissed in its entirety**.

c) For the avoidance of doubt, no eviction order, injunction, or award of mesne profits shall issue in favour of the Plaintiff.

d) Given the long history of litigation between the parties and in order to promote finality and harmony, **each party shall bear their own costs** of this suit.

**It is so ordered!**

**DATED, SIGNED and DELIVERED** virtually at **NAIROBI** on this **9<sup>th</sup>** day of

**October, 2025.**

**MOHAMMED N. KULLOW**  
**JUDGE**

**Judgement delivered in the presence of: -**

**N/A**..... for the Plaintiff

**N/A**..... for the Defendants

**Philomena W**..... Court Assistant