



REPUBLIC OF KENYA



KENYA LAW
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**Melly v Yator (Environment and Land Case 28 of 2020)
[2025] KEELC 6632 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6632 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE 28 OF 2020**

CK YANO, J

OCTOBER 2, 2025

BETWEEN

STEPHEN KIPCHIRCHIR MELLY PLAINTIFF

AND

MOSES KIBIEGO YATOR DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the Defendant vide plaint dated 19th June, 2020 seeking the following reliefs:-
 - a. A declaration that the Plaintiff is the absolute owner of all that parcel of land known as Title No. Kiplombe/Kiplombe/Block 6 (KUTSI)42.
 - b. A permanent injunction against the Defendant, his agents, servants or any other person claiming any rights or interests through the Defendant from trespassing, entering onto, cutting trees or in any way interfering with the Plaintiff's possession and use of parcel of land known as Title No. Kiplombe/Kiplombe/Block 6 (KUTSI)42 to be enforced by the officer in charge (OCS) Soy Police Station.
 - c. Damages for trespass and trauma.
 - d. Mesne profit for the period 29th April 2015 to 10th December 2019.
 - e. Costs of this suit.
 - f. Any other or further relief that this Honourable Court may deem fit and just to grant.
2. The Plaintiff states that on 26th February, 2015, he purchased the parcel of land known as Kiplombe/Kiplombe/Block 6 (KUTSI)42 (the suit property) at an auction pursuant to an exercise of Chargee's power of sale by Eco Bank Kenya Limited. That the transfer was registered on 29th April, 2015 after



which he was issued with the Title deed and he took possession on 10th December, 2019 and has been in possession since then.

3. The Plaintiff avers that on diverse dated between 30th March, 2020 and 15th June, 2020, the Defendant trespassed onto the suit land accompanied by goons and hooligans in breach of his ownership rights, cut down trees and destroyed the Plaintiff's tractor. The Plaintiff claims that when he protested, the Defendant responded by threatening him, his family and employees with violence. The Plaintiff averred that the Defendant's property rights ceased upon sale of the suit land and registration of the Plaintiff as the absolute owner. The Plaintiff states that he seeks orders to stop the trespass and damages being occasioned by the Defendant.
4. The Plaintiff was served on the Defendant who filed his Statement of Defence dated 27th July, 2020 denying the allegations set out in the Plaintiff. The Defendant avers that the suit land is subject of the proceedings in Eldoret High Court Civil Case No. 58 of 2018 Moses Kibiego vs Stephen Kipchirchir Melly & 2 Others. The Defendant explained that in the said case, he was seeking declaratory orders that the sale and transfer to the Plaintiff herein was unlawful, and cancellation of the title issued thereunder.
5. The Defendant averred that the Plaintiff's occupation of the suit property on 10th December, 2019 was illegal as it was based on a forged order emanating from proceedings in Milimani Environmental and Land Court Case No. 212 of 2018. He explained that the said proceedings did not involve the parties herein or the suit property, and neither was an eviction order issued therein. The Defendant denied trespassing on the suit property on the said date with hooligans or cutting trees and violating the Plaintiff's proprietary rights.
6. The Defendant further claimed that the Plaintiff is not entitled to the orders sought for reasons that this suit is sub judice due to various pending proceedings where the Plaintiff has sued the Defendant being Eldoret ELC Case No. 384 of 2016 and Eldoret Misc. Cause No. 45 of 2015. That similarly, there is Eldoret HCCC No. 58 of 2018, and owing to these pending proceedings, he urged that the court's only jurisdiction was to stay the instant suit. The Defendant added that this court lacks jurisdiction to grant damages for trauma as sought in the Plaintiff. The Defendant alleged that the sale/transfer is in issue and the validity of the Plaintiff's title is contested

Hearing and Evidence:

7. The matter initially proceeded before Hon. E. Obaga –J who took the evidence of PW1 pursuant to the provisions of order 18 Rule 8 (1) of the Civil Procedure Rules, I proceeded with the matter and took the evidence of DW1.

The Plaintiff's Case;

8. The hearing of the case commenced on 22nd November, 2022 with the Plaintiff testifying as PW1. He was sworn and adopted his witness statement filed on 19th June, 2020 as his evidence-in-chief. He also produced the documents in his list of documents dated 19th June, 2020 as his exhibits, while the documents filed on 28 June, 2022 were marked as MFI 1&2. PW1 testified that he is the registered owner of the suit property which he purchased at an auction. That he enjoyed quiet possession until the Defendant obtained orders to evict him without disclosing the material facts. PW1 testified that his property was destroyed and he asked to be compensated. He also asked for a permanent injunction restraining the Defendant from interfering with his property.
9. On cross-examination, PW1 testified that he purchased the suit property from Eco Bank through a public auction. PW1 said that he was not aware of Eldoret HCCC 58 of 2018. He testified that he did not obtain an eviction notice against the Defendant before entering the land on 10th December, 2019.



PW1 was referred to an eviction order in the Defendant's List of Documents and he told the court that he was not aware of it. PW1 testified that he had no photographs of the Defendant destroying his property because he was not aware of the destruction. PW1 testified that he had photos to prove that the Defendant cut down his trees, but in the next statement said that he did not have the said photographs. He testified that he was not joined in the previous suits between the Defendant and Eco Bank. PW1 said that he did not see the order the Defendant had when he came to evict him.

10. PW1 was re-examined and he testified that he supplied the photographs for the damages he is seeking. He testified that he is not aware of any eviction order against him. He acknowledged that there was a case before the ELC that went upto the Court of Appeal, which declined to have him joined to the suit.
11. This marked the end of his testimony, and the Plaintiff's case was closed on 18th July, 2024.

The Defendant's Case;

12. On the part of the Defence, the Defendant testified as DW1 and gave a sworn testimony. He adopted his witness statement filed on 28th May, 2021. DW1 also produced the documents in his List of Documents dated 27th May, 2025 as DEXb 2-7, while the valuation report was marked as DMFI1. He testified that he was evicted from the land on 10th December, 2019 and has never returned to the land as the Police told him not to return.
13. DW1 was cross-examined and he confirmed that the land is currently in the name of the Plaintiff, who is also the one in possession after evicting him. He denied attempting to evict the Plaintiff. DW1 also testified that the title deed was transferred on 29th April, 2015 after the land was sold by way of a public auction. That as of that date, he was on the land since Case No. 426 of 2013 was still ongoing, and he remained thereon until he was evicted in 2019. He testified that he had not produced any order allowing him to remain on the land, although he claimed that the order had been issued in the High Court.
14. DW1 was not re-examined and this marked the close of the Defence case.

Submissions:

15. At the close of the hearing, parties were directed to file their final written submissions each within 14 days, with the Plaintiff starting. The Plaintiff complied and filed his submissions dated 26th May, 2015. The Defendant, however, did not file within the prescribed time, and as at the time of writing this judgment, he still had not complied.

Plaintiff's Submissions;

16. In the Plaintiff's Submissions, Counsel cited Section 26(1), which provides that a certificate of title is prima facie evidence of proprietorship. Counsel submitted the Plaintiff had produced sufficient documentary evidence to show that he lawfully acquired the land through public auction from Eco Bank Limited. It was argued that if the Defendant alleged any illegality or fraud in the auction process, he ought to address it in a separate suit, and that he had in fact done so through Eldoret HCCC No. 58 of 2018.
17. Counsel for the Plaintiff cited the Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 on the computation of damages in an action for trespass. Counsel argued that the Plaintiff had demonstrated trespass and the damages he has suffered and is likely to suffer in the future. Counsel urged that the Defendant's defence consists of mere denials in spite of overwhelming evidence and his



unsuccessful attempts to invalidate the Plaintiff's title. Counsel asked the court to enter judgment for the Plaintiff and grant the orders sought with costs.

Analysis and Determination:

18. This court has considered the pleadings filed by the parties, the witness testimonies and the evidence tendered in court as well as the submissions filed herein. The issues for determination are:-
 - a. Who is the registered owner of the suit property?
 - b. Whether the alleged trespass by the Defendant has been proved;
 - c. Whether the Plaintiff is entitled to grant of the orders sought in the Plaintiff; and
 - d. Who shall bear the costs of this suit?
19. Before commencing the determination of these issues however, there is need to address the allegation that the instant suit is sub judice. This claim is made owing to the existence of other proceedings where the Plaintiff has sued the Defendant being Eldoret ELC Case No. 384 of 2016 and Eldoret Misc. Cause No. 45 of 2015, as well as Eldoret HCCC No. 58 of 2018.
20. I note that the Defendant only filed a copy of an Ex Parte Notice of Motion dated 7th June, 2015 in Chief Magistrates Misc. Civil Application No. 45 of 2015. In the said Motion, the Applicant, John Mutia T/A Jomuki Auctioneers sought a break in order against the Defendant herein over the suit property. It is impossible to tell the facts that led to the application or whether indeed that suit arose from the same cause of action.
21. Additionally, there are no pleadings or proceedings filed in the Eldoret ELC Case No. 384 of 2016 to enable this court determine whether this suit would run afoul of it. As for Eldoret HCCC No. 58 of 2018, this court was informed that it challenged the sale and transfer of the suit land to the Plaintiff herein in exercise of the Chargee's power of sale by Eco Bank Limited. The cause of action in this suit however, arises from the alleged trespass by the Defendant and not the sale of the land and transfer thereto to the Plaintiff. For this reason, the reliefs sought are different, despite involving the same subject matter, and the instant suit cannot be sub judice owing to the existence of Eldoret HCCC No. 58 of 2018.
22. Therefore, aside from making this allegation that the suit herein is sub judice, the Defendant failed to produce sufficient evidence, and/or prove that it was in fact sub judice any other pending suit.

a. Who is the registered owner of the suit property?

23. The first issue is whether the Plaintiff is the duly registered owner of the suit property. In this regard, the Plaintiff claims that he is currently the registered owner of the suit property, having purchased it at a public auction conducted by Eco Bank Kenya Limited. It is the Plaintiff's case that the land was transferred to him on 29th April, 2015 and he was issued with a title deed on the same date. The Plaintiff produced a copy of the Title Deed to the suit property showing that he is the registered owner thereto.
24. The Defendant did not dispute the fact that the land is currently registered in the name of the Plaintiff. He, however, explained that he was challenging the sale and transfer of the land to the Plaintiff on grounds that it was unlawful, through Eldoret HCCC No. 58 of 2018, which is between himself and the Plaintiff herein alongside two other persons.
25. With regards to ownership of land, Section 26 of the [Land Registration Act](#) provides that:-
26. Certificate of title to be held as conclusive evidence of proprietorship



- (1) 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.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
26. Having produced the title to the suit property in his name, which title the Defendant confirmed is a proper presentation of the current status of the land, it follows therefore that the Plaintiff is the current legal owner of the suit land.
 27. Section 26(1)(a) provides that a title can be challenged on grounds of fraud or misrepresentation that a party is proved to be a party of. No such claim was made or established in this case. Section 26(1)(b) allows that a title can be challenged if it was acquired illegally, unprocedurally or through a corrupt scheme.
 28. The Defendant has alleged that the Plaintiff acquired the suit property unlawfully and that he is seeking a cancellation of the title in the High Court case. For starters, the Defendant did not specifically plead the particulars of unlawfulness on the part of the Plaintiff in the manner in which he acquired the suit property. That notwithstanding, the Defendant also failed to prove the alleged unlawfulness.
 29. Understandably, the events leading up to the eviction of the Defendant from the suit land by the Plaintiff are unfortunate. I have perused the Defendant’s documents and indeed, the Plaintiff did use an eviction order dated 4th December, 2019 that was allegedly issued in Milimani ELC Case No. 212 of 2018. I have seen a copy of the pleadings filed in that suit and note that indeed, the said suit does not involve the parties in this suit, and the subject matter is also different. Evidently, there is an element of forgery which is of a criminal nature, and for that, an appropriate machinery exists for reporting and handling such an offence. Unfortunately for the Defendant, this is not the appropriate court to deal with that issue.
 30. Moreover, if the Defendant intended to claim anything from the alleged illegal eviction, he ought to have mounted a counterclaim. Unfortunately, he failed to do so, and the only thing he is claiming in this suit is dismissal of the suit. This cannot issue since the Plaintiff has proved that he is the legal and registered owner of the suit land despite how he gained entry into the land.
 31. Accordingly, the Plaintiff remains the registered owner of the land, until and unless the sale is declared null and void and his title cancelled, nullified and/or revoked.



b. Whether the alleged trespass by the Defendant has been proved;

32. In *Ali vs County Government of Mombasa & another* (Civil Case 143 of 2019) [2024] KEELC 4055 (KLR), the court defined trespass in the following words:-

“Accordingly, the provision of 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.’”

33. Similarly, the Court of Appeal in *Charles Ogejo Ochieng vs Geoffrey Okumu* (1995) eKLR, defined trespass as:-

“Trespass is an injury to the possessory right, and therefore the proper Plaintiff in an action for trespass to land is the person who has title to it, or a person who is deemed to have possession at the time of the trespass.”

34. Trespass therefore refers to an unlawful intrusion onto someone else’s property or remaining on the property after being asked to leave and includes erecting structures, cultivating and grazing of livestock on the land. Trespass typically interferes with the registered owner’s or any beneficial owner’s lawful possession of their property.

35. In *M’Mukanya vs M’Mbijiwe* (1983) eKLR, Kneller JA (as he then was) laid the ingredients of trespass in the following words:-

“The only issue in this second appeal is whether or not the Magistrate and the judge erred in law in finding M’Mukanya and Nyamu were trespassers? M’Mbijiwe could, and may be should, have asked for a declaratory judgment but he brought an action of trespass to land to determine the title to the large plot 58 in this market. 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.”

36. There is no doubt that as the registered proprietor of the suit land at the time of the alleged trespass, the Plaintiff had the right to immediate entry and possession of the suit property. There is also no doubt that the Plaintiff was actually in possession of the suit land during the said period. What needs to be determined is if indeed the Defendant went into the Plaintiff’s land without his permission and/or consent.

37. In this suit, the Plaintiff pleaded that the Defendant had trespassed onto his land with goons and hooligans and not only interfered with his proprietary rights as the owner but also cut trees and destroyed his property.

38. The Defendant on his part, pleaded that he lived on the suit land until 2019 when he was illegally evicted. He states that he was told by the police to never return to the land, and he has not done so to date. He denied the trespass alleged by the Plaintiff or that he had destroyed the Plaintiff’s property.



39. There is no evidence proving the alleged trespass or that the Defendant has been back to the land after he was evicted. The Plaintiff did not call any witness to testify to the alleged trespass by the Defendant. There is no police report showing that the alleged trespass and destruction of property was reported to the authorities.
40. If anything, the Plaintiff alleges that the Defendant went to the land on the strength of an eviction order obtained without disclosing material facts, but no such order was produced before this court, and neither did he state the proceedings in which it was allegedly obtained. The Plaintiff himself testified that he did not see the order the Defendant had when he allegedly went to the land. During re-examination, the Plaintiff testified that he is not aware of any eviction order against him.
41. The Plaintiff has not told this court that he was removed from his land by the Defendant, and neither is there any police report with regard to the alleged entry into the land by the Defendant and his goons and hooligans.
42. All in all, I see no evidence that the Defendant or any one acting under him entered into the suit land without permission as alleged or at all. In the absence of evidence that the Defendant entered the land, he cannot be said to have trespassed onto the land.

c. Whether the Plaintiff is entitled to grant of the orders sought in the Plaintiff

43. In this suit, the Plaintiff has sought a declaration that he is the absolute owner of the suit property. This court having found that he is in fact the current registered owner of the land, he is no doubt entitled to such declaration.
44. Flowing from this relief, the Plaintiff sought a permanent injunction restraining the Defendant or anyone claiming through him, from trespassing, entering onto, cutting trees or in any way interfering with the Plaintiff's possession and use of the suit land. As the registered proprietor of the land, the Plaintiff is entitled to enjoy the interest conferred by such registration, which are provided under Section 24(a) of the *Land Registration Act* as:-
 24. Interest conferred by registration
Subject to this Act—
 - (a) 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
45. Such rights and privileges includes the ability to occupy and enjoy quiet possession of his land. Evidently, the Plaintiff was not able to prove that the Defendant trespassed onto his land. However, he is still entitled to protection of his proprietary interests from interference by the Defendant or any one claiming under him, who has no legal basis to visit the Plaintiff's property as it is private property.
46. The Plaintiff also sought damages for the alleged trespass and trauma. The court has already found that the Plaintiff has failed to prove his allegation of trespass against the Defendant. Notably, the Plaintiff testified during cross-examination that he had no photographs showing that the Defendant is the one that destroyed his property and that he was not aware of the destruction. He also had no photographs of the Defendant cutting down trees.
47. The only evidence produced to that effect is a photograph of a tractor, from which no destruction can be determined. There are also two photographs of what appears to be the same tree stump. It is not clear



from these photographs that any destruction, if at all, was occasioned specifically by the Defendant or anyone acting under him.

48. Moreover, since the Plaintiff failed to prove the alleged trespass, it is not fathomable how the Defendant could have possibly destroyed property on the suit land without actually entering it. For these reasons, the Plaintiff failed to prove this claim and is therefore not entitled to the damages sought.
49. Aside from damages for trespass, the Plaintiff also asked for mesne profits for the period 29th April 2015 to 10th December 2019. Mesne profits are defined by the Black's Law Dictionary, 11th Edition simply as:-

“The profits of an estate received by a tenant in wrongful possession between two dates.”

50. A detailed definition is found in *Rajan Shah T/A Rajan S. Shah & Partners vs Bipin P. Shah* (2016) eKLR, where the court held that: -

“A more useful description of mesne profits can be found in Halsburys Laws of England, which defines mesne profits as an action by a land owner against another who is trespassing on the owner's lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant's interest in the land has come to an end ... Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.”

51. Mesne profits therefore refer to the profits or income earned from a property by a person/tenant who is in wrongful possession of that property. They accrue from the date the tenant ought to have surrendered possession to the date they actually give up possession. No landlord and tenant relationship was claimed between the Plaintiff and Defendant, and neither was one established. Furthermore, the Plaintiff did not submit proof that any such profits were earned by the Defendant to justify an award in mesne profits. The Plaintiff is therefore not entitled to an award under the head of mesne profits.

d. Who shall bear costs of the suit?

52. Costs of an action or proceeding are at the discretion of the court. The general rule however, is that costs shall follow the event in accordance with Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless, pursuant to the proviso of the said Section 27, the court for good reason, directs otherwise.
53. The cause of action in this suit was the alleged trespass. The Plaintiff dragged the Defendant to court alleging trespass and destruction of property, which he then failed to satisfactorily prove to this court. The Plaintiff also failed to prove the claim for damages and mesne profits. That being the case, the Plaintiff has partly succeeded and partly failed in his claim. For this reason, the court is of the opinion that each party should bear his own costs. As a consequence, the court shall order that each party shall bear his own costs of the suit.



