



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO 111 OF 2007

1. GEOFREY NGALA

2. EDWARD TSUMA TEWA

3. EMMANUEL TSUMA MBARU

4. ALRED RIKO MWALENGA.....

PLAINTIFFS

VERSUS

ATHI

RIVER

MINING

LIMITED.....DEFENDANT

JUDGMENT

1. This case was filed in 2007. It was scheduled for dismissal due to lack of prosecution when Mr. Nyanje learned counsel

for the Plaintiffs informed the court that the Plaintiffs were eager to move forward with the case.

- 2.** Given the age of the case, the court ordered proper service on the Defendant since the cause of action - trespass — appears to have allegedly arisen in 1998.
- 3.** When the matter was called for hearing, Mr. Nyanje stated that he had served the Defendants. He filed a return of service. The matter proceeded *ex parte* since the Defendant did not turn up at the hearing.
- 4.** The Plaintiffs called five witnesses who were successors of the originators of the suit since most of them had passed on.
- 5.** At the hearing, the witnesses stated that the Defendant in 1998 engaged in quarrying in that area and specifically trespassed onto land parcel No. 133 in the Pangani Adjudication Section. The claim seeks compensation for unlawful entry, encroachment, and ongoing occupation of Kilifi/Pangani/133 - Kaloleni.
- 6.** The witnesses stated that the incident took place in 1998 and that the valuation report for the property showed damage to the land totaling 62 million.

7. I appreciate submissions from Mr. Nyanje, learned counsel for the Plaintiffs, who argued that the Defendants have been involved in commercial quarrying, environmental degradation, and unlawful occupation of the suit property since 1998, violating the 2010 Constitution and the Environmental Management and Co-ordination Act (EMCA) 2009, and damaging the Plaintiffs' property due to the said trespass, and that the Defendant is liable to compensate.
8. The single dominant issue I present for settlement is whether the Plaintiffs have proved their case on a balance of probabilities against the defendant, and who should bear the costs of the suit.
9. The matter, as alluded to, proceeded *ex parte*, but the Defendant had filed a defense in the case, which I will refer to later.
10. Let me quote a passage from Emukule J. on handling a matter involving a formal proof; although no defense was filed, his Lordship stated in **Samson S. Maitai & Another v African Safari Club Limited and Another [2010] KEHC 595 (KLR)** as follows:

“If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption. In civil cases the court makes its decision on the “balance of probabilities”. In criminal cases, a case must be proved “beyond reasonable doubt.” For instance, to prove a debt is to establish a debt is due from a debtor, whether contractual as in this case, or out of bankruptcy.”

- 11.** The first issue I will address is whether the Defendants were properly served. In the initial plaint, the Defendants were named as Athi River Mining Limited. From the return of service, the entity served was Athi Cement Limited; however, I cannot confirm if it is the same entity, given the passage of time and the Plaintiffs’ failure to produce a certificate of incorporation and directorship of the said entities, whether they were one and the same. I doubt this form of service, and I had raised it with counsel for the Plaintiffs, but he insisted on proceeding.

12. On the merits of the case, the Plaintiff's claim is based on trespass. A review of the plaint shows that the Defendants raised issues regarding the ownership of the involved property and the limitation of action based on the tort of trespass. See paragraphs 4 to 8 of the defense dated January 17, 2008.

13. In **Mwangi v Njaria [2022] KEELC 13564 [KLR] (19th October 2022) (Judgment)**, the court observed that what underlies the issue of trespass is ownership of the land. The court cited **Winfield and Jolowicz on Tort, Sweet and Maxwell, 19th Edition, page 428**, that trespass to land constitutes interference with possession, and that mere presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. The court also noted that the claimant should have some legal interests in the land, and that, in the absence of evidence to the contrary, the owner of land with a proper title is deemed to own the land. The court held that the owner must give consent; without it, a person will be considered to have trespassed on the land.

- 14.** In this case, apart from the Plaintiffs claiming ownership of the land in question, they produced nothing to prove ownership or the status of the suit property, which was under adjudication in 1998, and whether it was registered in the name of their predecessors from whom they progressed this suit.
- 15.** On the limitation of actions: an action for the tort of trespass, as we know it, is actionable three years after its accrual. See **Section 4(2) of the Limitation of Actions Act.**
- 16.** The trespass in this case was said to have occurred sometime in 1998 and was stopped, as per the valuation report in 2001. This suit was filed on December 20, 2009, which is about 6 years late; if we consider the trespass ended in 2001, it is 3 years late.
- 17.** The submissions by Mr. Nyanje for the Plaintiffs that this was a continuous trespass are misconceived and misleading because the testimony of the parties, who were unsure when the trespass ended, does not support that claim. The

valuation report produced by the Plaintiff clearly states that the trespass ended in 2001.

18. In Maina v Waweru and 2 others [2025] KEELC 791 (KLR), citing various authorities on trespass, the court demarcated what constitutes trespass *per se* and what constitutes *continuous trespass*:

***“On limitation of action, whereas a cause of action based on tort must be brought within 3 years after accrual, the court said in case of continuing trespass, a trespass consists of a series of acts done on consecutive days that are exact and that are renewed or continued from day to day, aggregate from one indivisible harm. The court cited the Jowitts Dictionary of English Law 2nd Edition that a continuing trespass is permanent in its nature, as where a person builds on his land so that part of the building overhangs his neighbor's land and in Clerk & Lindsell on Torts 16th Edition, that every continuance of a trespass was a fresh trespass, raising a new cause of action from day to day as long as the trespass continues.*”**

.The court held that any unauthorized entry, whether present or continuous, was trespass; in the instant case, there was no dispute that the appellant entered into and had remained in continuous occupation from the first day of entry without authorization; hence, it was a trespasser, which acts of trespass could not be time-barred.

19. The net effect of the foregoing is that, although the matter proceeded ex parte, the Plaintiff has failed to demonstrate proper service of the Defendants, ownership and beneficial interest in the suit property, and, above all, that their claim suffers from laches and delays and is barred by statutes.

20. The current suit is dismissed. This is partly due to parties filing suits and the effect of having pending suits in courts, which can be likened to parking bays.

21. Since the defendants never appeared to defend, there will be no order as to costs.

Dated, signed, and delivered virtually at Malindi on this 9th day of October, 2025.

E. K. MAKORI

JUDGE

In the presence of:

Mr. Mulisho for the Plaintiffs

Happy: Court Assistant

In the Absence of:

The Defendants