



REPUBLIC OF KENYA



**KENYA LAW**  
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**Manyara v Mbae (Environment & Land Case E002 of 2021)  
[2024] KEMC 116 (KLR) (31 May 2024) (Judgment)**

Neutral citation: [2024] KEMC 116 (KLR)

**REPUBLIC OF KENYA  
IN THE GITHONGO LAW COURTS  
ENVIRONMENT & LAND CASE E002 OF 2021  
AT SITATI, SPM  
MAY 31, 2024**

**BETWEEN**

**JOSECK GATOBU MANYARA ..... PLAINTIFF**

**AND**

**COSMAS MBAE ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 18<sup>th</sup> November, 2021 verified by an affidavit of similar date, the Plaintiff herein prayed for:
  1. An order of permanent injunction restraining the Defendant, his agents, servants or anyone acting on his behalf from entering into, putting up any structures, cultivating, planting, harvesting or in any other manner howsoever interfering with land parcel numbers Kiamuri “A”/3121 and Kiamuri “A”/3122.
  2. General damages for trespass.
  3. Costs of the suit and interests.
2. Subsequently, an Amended Plaint was filed dated 16<sup>th</sup> November, 2022 pleading unlawful occupation of the plaintiff’s land and praying for the following amended reliefs:
  - a. An order of permanent injunction restraining the Defendant, his agents, servants or anyone acting on his behalf from entering into, putting up any structures, cultivating, planting, harvesting or in any other manner howsoever interfering with land parcel numbers Kiamuri “A”/3121 and Kiamuri “A”/3122.
  - b. An order of eviction/removal of any structures on the suit land
  - c. General damages for trespass.



- d. Mesne profits at the rate of Kshs 50, 000 per annum.
- e. Costs of the suit and interests.

Accompanying the Amended Complaint were:

- i. Written witness statement of the plaintiff, Duncan Mwebia Kagwaru, Stephen Murimi Mukiri and Stanley Mutua.
  - ii. List and bundle of documents containing: Copy of title deed LR Kiamuri "A"/3121 Copy of title deed LR Kiamuri "A"/3122. Certificate of official search for LR Kiamuri "A"/3121 Certificate of official search for LR Kiamuri "A"/3122. Photo showing temporary structures. Copy of the charge-sheet in Githongo Criminal Case No. E075 of 2020 – Republic –v- Cosmas Mbae. Valuation report by Probity Valuers. Demand letter dated 18/09/2019.
  - iii. Further List of Statement by the plaintiff dated 13<sup>th</sup> April, 2023.
  - iv. Reply to defence dated 13<sup>th</sup> April, 2023.
3. The suit was opposed by a Statement of Defence dated 16<sup>th</sup> December, 2022 wherein the Defendant prayed for a dismissal of the entire suit pleading that the plaintiff fraudulently procured the registration of the subject parcels of land in 2019 long after the defendant had purchased the same pieces of land way back in 2002.

Accompanying the Defence were:

- a. List and bundle of witnesses' statements containing the statements of the Plaintiff, Ezekiel Kinamisi and Zakaria Muthaura.
  - b. List and bundle of documents dated 16<sup>th</sup> December, 2022 containing the following documents: Green card copy for LR Kiamuri "A"/1887 Bundle of photographs Copy of charge-sheet in Criminal Case No. E075 of 2020. Copy of judgement in Criminal Case No. E075 of 2020.
  - c. Further defendant's statement filed on 20<sup>th</sup> July, 2023.
  - d. Defendant's further list of documents dated 14<sup>th</sup> July, 2023 containing: 2 survey maps from the Ministry of lands showing the physical location of Kiamuri "A"/1887 registered in the name of Kagwaru Kairu and the plaintiff's parcels of land LR Kiamuri "A"/3121 and 3122 which are distinct and separate from each other Certificate of official search for Kiamuri "A"/1887. Proceedings in PMCR No. 963 of 2019 Republic –vs- Cosmas Mbae. Letter dated 3/1/2002 by the Area Chief.
4. At the close of their pleadings, the suit went for hearing. The firm of Mithega & Kariuki Advocates represented the Plaintiff while Gikunda Anampiu & Company Advocates represented the Defendant.

### **The Plaintiff's Case**

5. PW1 Joseck Gatobu Manyara adopted his witness' statements and produced all the listed documents. In summary, he told the court that the 2 subject parcels 3121 and 3122 were the product of subdivision of Kiamuri "A"/1791 purchased by himself vide sale agreements dated 8/7/2019 for 3121 measuring 1 ¼ acre and 24/02/2020 for 3122 measuring ¼ acre from Duncan Kagwaru.



6. He confirmed that they were subdivided before the numbers were created and that these 2 parcels had nothing to do with Kiamuri "A"/1887 being claimed by the Defendant. He affirmed that at the time of the purchase, the defendant was not in possession or occupation of 3122 but that 3121 was partially occupied by Luka Muthuri Cosmas who was a son of the Defendant. He added that on 27/03/2020 the said Luka Muthuri voluntarily moved out after arbitration but 3 months later the defendant herein took advantage and invaded the land.
7. He pinpointed to 15/07/2020 as the date of the invasion of the land by the defendant. To shed light on the history of the case, he stated that 3121 and 3122 were products of sub-division
8. He asserted that 3121 and 3122 were his registered properties and that the defendant and his kinsmen had invaded the same and put up a mabati structure and committed acts of wastage on mango trees and other assets. He added that the case was reported to the police and the accused charged with forcible detainer. The dates of trespass and invasion were stated as 15/07/2020, 30/10/2021 and 11/11/2021.
9. In cross-examination, it was affirmed that the plaintiff bought the land from Duncan Kagwaru after conducting due diligence. It was added that 1887 was a separate piece of land from 3121 and 3122. He added that he was unaware that Duncan Kagwaru had previously complained against the defendant's son Luka vide CR 963/2019 but which case was withdrawn under section 87(a) CPC. Further that, he was untrue that at the time of PW1's purchase, the defendant was in active possession of the parcels in question.
10. In re-exam, he confirmed that when he instructed a surveyor to visit the land for inspection on 31/5/2022 the defendant was still occupying the subject land. He confirmed that the proceedings in CR 963/2019 speak of parcel 1887 which was not of any interest to him. He relied on the valuation report showing extent of encroachment and the damages occasioned.
11. PW2 Duncan Mwebia Kagwaru adopted his witness statement. By it he told the court that he owned Kiamuri "A"/1791 from 1992 but after selling portion of it to the plaintiff the land was subdivided into 3121 to 3125. He confirmed that the plaintiff paid the consideration in full. He confirmed that Luka Muthuri who was a son to the defendant had illegally occupied 1/8 acre on the sold parcels but LUKA MUTHURI voluntarily moved out but the Defendant saw a vacuum and invaded the sold parcels.
12. In cross-examination, PW2 affirmed that the trees in the subject land were originally planted by him in 1992. He added that none of the plaintiff's children are buried thereon.
13. PW3 Stanley Mutua adopted his witness statement telling the court that it was true that his father sold the defendant 1 acre out of parcel Kiamuri "A"/18 and the same was transferred to the defendant after litigation before the Land Disputes Tribunal. He stated that parcel 18 and the 2 parcels 3121 and 3122 shared a common boundary lines. In cross-exam he confirmed that the defendant had trespassed onto the plaintiff's properties.
14. In re-exam he confirmed that the defendant and his son had invaded the plaintiff's land.
15. PW4 Stephen MurimI the Chief of Kiamuri adopted his witness statement as his testimony. He stated that the Defendant lived in Isiolo but occasionally visited Kiamuri location. He confirmed that he was involved in resolving the illegal occupation by Luka Muthuri whereby Luka has occupied 1/8 acre of 3121 but voluntarily moved out after the chief called for a meeting after a written consent. He stated that when the defendant was arrested and charged in court for forcible detainer, he stopped the trespass but when the criminal case was terminated, the defendant resumed the trespass.
16. In cross-examination, he confirmed that the defendant had put up a mabati structure on the suit land from 2021 to date. He denied knowledge of the specific land parcel registration numbers.



17. In re-examination, he stated that the position of 1887 on the map was far apart from the position of the plaintiff's portion. At the end of his testimony, the Plaintiff closed his case.

### **The Defence Case**

18. DW1 Cosmas Mbae Ngatunyi adopted his witness statement as his testimony and produced his listed documents as exhibits in the case. In summary, he told the court that he bought 2 acres from Kagwaru Kairu who was the father of Duncan Kagwaru and took possession but after the demise of Kagwaru senior, the sons turned against him with a view to dispossess him of his property. He told the court that his 2 acres was to be excised from Kiamuri "A"/1887.

19. In cross-examination, the following came to light:

- i. He bought the parcel 1887 between 2002 and 2004 but admitted that he recorded no sale agreement for the said purchase.
- ii. He admitted that as per the search certificate of 1887, the registered owner was Duncan Kagwaru who had not yet transferred the same to the defendant.
- iii. M'Bundi had sold parcel no. 18 to the defendant.
- iv. Stanley Mutua was a son to the said M'Bundi.
- v. In the 2 maps produced by DW1 the subject parcels 3121 and 3122 are captured as well as 1887.

20. In re-examination, he confirmed that he bought a portion of 2 acres that was to be excised from 1887.

21. DW2 Ezekiel Kinamisi rejected his written witness statement as his testimony stating that he was illiterate and could not accept it. He was stood down as a witness.

22. DW3 Zakaria MuthaurA adopted his written witness statement. In cross-examination, he told the court that he did not know the parcel numbers for the land owned by the defendant. He recalled that he escorted DW1 to deliver some KSHS 10, 000/- as part of the sale price.

23. In re-examination, he stated that he had known the defendant as the occupant and cultivator of the subject land.

24. DW4 Zachary Gikunda Kanampiu adopted his witness statement as his testimony. In summary, he told the court that the defendant purchased the land from ELIAS Kagwaru and retained continuous possession but that when ELIAS Kagwaru died, his children decided to evict the Defendant who was a lawful purchaser.

25. When cross-examined, he told the court that Duncan sold 1791 to the Defendant and that the Defendant never bought 1887. He stated that 1791 was subdivided into 3121 and 3122. He admitted that the parcels 3121, 3122 and 18 on the Maps produced by the Defendant were positioned in different and separate locations.

26. In re-examination, he stated that the Defendant bought a numberless piece of land. Further that when the original parcel no. 12 was subdivided by Duncan Kagwaru, it gave birth to 319, 1480, 1791 and 1975 and that the origin of 1887 was unknown to him.

27. At the end of this testimony, the defence closed his case and the court was called upon to determine whether or not the parties had established their respective cases on a balance of probabilities.

Undisputed Issues



1. The plaintiff is the registered owner of Kiamuri "A"/3121 and Kiamuri "A"/3122 having purchased the same from Duncan Kagwaru in 2019.
2. From the Green card for Kiamuri "A"/1887, the evidence shows that 1887 was the product of a subdivision of Kiamuri "A"/12. When the said 12 was subdivided, new numbers from 3100 to 3104 were created and 1887 register closed. This means that 1887 is non-existent.
3. No sale agreement was recorded between the defendant and the alleged vendor Elias Kagwaru Kairu (deceased).
4. Luka Muthuri who was a son to the defendant voluntarily moved out of the plaintiff's purchased properties 3121 and 3122 following intervention by the local chief.

### **Issue for Determination**

28. The issues for determination are:

1. Is there proof of trespass?
2. Has the plaintiff made out a case for the grant of the reliefs prayed for?

### **Issue I: Trespass to Land**

29. In the authority of Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira [2021] eKLR (M. Kamau J.) held that

"As to General Damages for trespass, In Park Towers Ltd...Vs... John Mithamo Njika et al (2014) eKLR, the Court held that: -

"I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case."

Trespass has been defined as "any unjustifiable intrusion by one person upon the land in possession."

30. In the case of Philip Aluchio...Vs...Crispinus Ngayo [2014] eKLR, the Court held as follows:-

"..... The plaintiff is entitled to General Damages for trespass. The issue which arises is as to what is the measure of such Damage. It has been held that the measure of Damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less....The Plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess General Damages for trespass..."

31. In the case of Willesden Investment Limited =Vrs= Kenya Hotel Properties Limited HCC No. 367 of 2000.

"The court held that there is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstance in each case".



There is no doubt that the Defendant did enter upon the suit land and its actions caused interference with the Plaintiff's use and occupation of the suit land. However, the Plaintiffs did not provide the value with which the Court is to work nor did they provide any Valuation Report of the land where the Defendant trespassed. There is no Valuation Report to show the extent of damage.

Nevertheless, Trespass is actionable per se. Additionally, the Plaintiffs must have suffered considerably for being kept out of the use of their land and also they will be forced to unearth the rocky soil, transport it out of the land and get a place far away to dump it, get and pay for a dumping license from the same Defendant and then get good clay or black cotton soil at a cost and have it transported to the suit land in order to restore the land to its original condition before the intrusion.”

32. In the court's consideration of the facts arising from the documentary and tested evidence by way of cross-examinations, it was proved that the defendant had wholly encroached into 3122 and 3121 using the pretext that Criminal Case Number E075 of 2020 determined him as he owner when in fact the decision in that criminal case never adjudged him as the owner. The court has studied the said judgment and nowhere did the trial magistrate in the criminal case determine that the defendant was entitled to own or occupy the suit land. The magistrate dismissed the case only because Kagwaru had not been called as a material witness in that case to shed light on the circumstances of the land transactions.
33. The defendant's action of entering and occupying the subject lands was therefore unlawful and illegal amounting to trespass for which the court enters Judgement for the plaintiff as prayed on the head of trespass. The defendant's plea that the plaintiff committed fraud against him is unproven because the plaintiff proved lawful purchase and acquisition of the land vide sale agreements and lawful transfers.
34. On his part, the defendant had no sale agreement as the foundation of the purported ownership. Having realized that he had no sale agreement, the defendant changed tune and claimed adverse possession. The court rejects the claim for adverse possession as it was baseless: it cannot be that the defendant approbates and reprobates at the same time by claiming purchase and then turning around to plead adverse possession. Such inconsistent conduct was considered in Republic V Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteria [2010] eKLR citing with approval the authority of Evans V Bartlam (1937) 2 ALL ER 649 at page 652 where Lord Russel of Killowen said:

“The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit.”

Again in Banque De Moscou V Kindersley (1950) 2 ALL EER 549 Sir Evershed said of such conduct;

“This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish Lawyers (frame it) approbating and reprobating or, in the more homely English phrase, blowing hot and cold.”

The defendant has no legal claim.

## 2.

Has the plaintiff made out a case for the grant of the reliefs prayed for?



## Permanent Injunction

35. As a registered owner in absolute title, the plaintiff is entitled to the peaceful possession and the quiet enjoyment of his registered land 3121 and 3122. Therefore, a permanent injunction is hereby issued against the illegal trespasser.

## General Damages

36. From the valuation report, it was proved that the encroachment occasioned a loss that would require not less than Kshs 150, 000/= to restore the land to its condition before the trespass. In the result, judgement is entered on this amount.

## mesne profits

37. on this prayer, the court found guidance from The Learned Nyamweya J (as she then was) in the case of *Karanja Mbugua & another v Marybin Holding Co. Ltd* [2014] eKLR where the Judge stated as follows with regard to mesne profits:-

This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of *Civil Procedure Act*. The said provisions state as follows with regard to a decree for possession and mesne profits:

- “(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-
- a. For the possession of the property.
  - b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.
  - c. Directing an inquiry as to rent or mesne profits from the institution of such suit until :-
    - i. The delivery of possession to the decree-holder
    - ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or
    - iii. The expiration of three years from the date of the decree, whichever even first occurs.
- (2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/= per month, and this court is therefore not able to award the same. In any event when the Plaintiffs agreed to give vacant possession to the Defendant after payment of only the deposit, and they must be taken to have accepted the risks that would follow in the event of non-performance of the contract. The forfeiture of the deposit by the Defendant therefore in the circumstances adequately compensates them for such non-performance.”



38. For the present case, there is proof that the plaintiff has proved through the valuation report that he was entitled to mesne profits in the amount of Kshs 50, 000 per annum from being deprived the use of the suit lands. Counting the date of 15<sup>th</sup> July, 2020 as the date of commencement of the trespass, the court enters judgement for mesne profit at the rate of Kshs 50, 000/= per annum until payment in full.
39. The final orders:
- a. An order of permanent injunction restraining the Defendant, his agents, servants or anyone acting on his behalf from entering into, putting up any structures, cultivating, planting, harvesting or in any other manner howsoever interfering with land parcel numbers Kiamuri "A"/3121 and Kiamuri "A"/3122.
  - b. An order of eviction/removal of any structures on the suit land is issued and shall be executed subject to compliance with sections to 152A to 152H of the Land Act cap 280 Laws of Kenya Act.
  - c. General damages for trespass Kshs 150, 000/=.
  - d. Mesne profits at the rate of Kshs 50, 000 per annum starting from 15<sup>th</sup> July, 2020 till the date the trespasser is evicted.
  - e. Costs of the suit and interests at 14 % from the date filing the suit till payment in full.

It is so ordered. Right of appeal is 30 days.

**DATED, READ AND SIGNED AT GITHONGO THIS 31<sup>ST</sup> DAY OF MAY, 2024**

**HON. T.A. SITATI**

**SENIOR PRINCIPAL MAGISTRATE**

**GITHONGO LAW COURTS**

Present

Miss Gitari Advocate for the plaintiff

Mr. Gikunda Advocate for the defendant

Plaintiff

Defendant

Ronny and Joan Court Assistants.

