



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT**  
**AT NYAHURURU**  
**ELC CASE NO 262 OF 2017**  
**(FORMERLY NAKURU 320 OF 2016)**

**JOHN ANGELO KIBET.....1<sup>st</sup> PLAINTIFF**

**JOSEPH NGIGE IKUMU.....2<sup>nd</sup> PLAINTIFF**

**VERSUS**

**THE BOARD OF GOVERNORS OF**

**MAGOMANO PRIMARY SCHOOL (JOSEPHAT KIBE,**

**PAUL KANGETHE, SAMWEL KAMAU KARANJA)....1<sup>st</sup> DEFENDANT**

**DANIEL KAMAU PTA CHAIRMAN**

**MANGOMANO PRIMARY SCHOOL.....2<sup>nd</sup> DEFENDANT**

**JUDGEMENT**

1. Coming up for determination is a matter wherein the Plaintiff initially filed his Complaint together with his application for interim orders on the 11<sup>th</sup> August 2016 at the Nakuru High Court.
2. In the said complaint, the Plaintiff sought for orders that;
  - i. Eviction of the Defendant from the Plaintiffs 12 acres of land contained in the Plaintiffs parcels of land and LR Nyandarua/Ndemi 862, 5075, 5076, 5077, 5078, 5079 and 5080 and the reinstatement of the official boundary and boundary marks between LR Nyandarua/ Ndemi/1366 on one part and LR Nyandarua/Ndemi/862, 5075, 5076, 5077, 5078, 5079 and 5080 on the other hand at the defendant's own cost.
  - ii. Permanent injunction against the Defendants or any other person acting on their behalf from entering into, cultivating, demolishing dwelling structure, cutting and harvesting trees, remaining on and or any other way interfering with the Plaintiff's quiet occupation and enjoyment of Nyandarua/Ndemi/862, 5075, 5076, 5077, 5078, 5079 and 5080
  - iii. General damages for inconvenience and compensation for the destroyed trees.
  - iv. Cost of this suit.
3. From the record, it is clear that on the 27<sup>th</sup> September 2016, there was a Notice of Change of Advocates filed by the firm of Kiarie, Kabita, Kihunya & Associates who came on record for the Defendant one David Kamau Gachago.
4. A further look at the statement of defence and parties therein, I note that the parties and the Pleadings in the defendant's defence are not parties in this matter, although the case number corresponds to the preset case.
5. Since the said pleadings relate to a completely different parties and subject suit. I shall take it that they were misfiled in the present file and shall not refer to them in this judgment.

6. On the 11<sup>th</sup> August 2016, interim orders were issued Before Hon Munyao Sila (J) to the effect that:

i. That pending interparty hearing of the application dated 11<sup>th</sup> August 2016 there be no cutting of trees, clearing of any vegetation, erection or development of any structures or bill boards in the land parcels Nyandarua/Ndemi/862, 5864, 5865, 5867, 5075, 5077, 5078, 5079 and 5080.

7. The interparty hearing was fixed for the 11<sup>th</sup> October 2016, wherein on the said date, the coram consisted Ms. Muthoni Advocate for the Plaintiffs while the Defendants were represented by Mr. Kirui, state Counsel. Counsel for the Plaintiffs informed the court that by consent, parties had agreed to maintain the status quo and that orders of 11<sup>th</sup> August 2016 do prevail pending hearing of the suit, which consent was adopted as the order of the court whereby the Defendants were given 30 days to file their defence and witness statements.

8. The Defendants failed to comply with the orders of the court such that when the matter was subsequently transferred to the Nyahururu Environment and Land Court upon its establishment and the same placed before me on the 3<sup>rd</sup> May 2017, there was no appearance by the Defendants. The court was also informed that they had not entered appearance although they had been served. Counsel for the Plaintiff thus requested for another mention date to confirm whether parties would have complied. The court directed the parties to comply within the next 60 days and set the date to confirm compliance for the 14<sup>th</sup> June 2017.

9. On the said date, there was still no appearance for the Defendants despite service of the Mention Notice. Counsel for the Plaintiffs sought for directions on the hearing of the main suit.

10. The court was also informed that the Hon Attorney General had still not filed any documents. That they had complied with the courts' orders and sought to have the surveyor of Nyandarua County to visit the subject parcels of land No Nyandarua/Ndemi/862, 5075, 5076 5077, 5078, 5079 and 5080 as well as Nyandarua Ndemi/1366 the Defendant's parcels of land herein and thereafter file his report within 45 days a prayer which was granted by the court. Leave was also is granted to the Defendants to file their papers within 30 days from the said date.

11. On the 3<sup>rd</sup> October 2017 when the matter came up for mention, to confirm compliance, there was still no appearance by the Defendants. The court noted that the county surveyor had not complied with the orders of 14<sup>th</sup> June 2017 wherein it directed the Deputy Registrar to write a reminder to the county surveyor Nyandarua to file his report within the next 14 days.

12. On the 20<sup>th</sup> February 2018, when the matter came up again for mention, although there was no appearance by the Hon the Attorney General, they had filed their statement of defence and list of documents on the 5<sup>th</sup> December 2017. The Surveyor's report dated the 12<sup>th</sup> October 2017 had also been filed in court file.

13. Parties were informed, following their submissions to have a private surveyor visit the scene, that if they were not satisfied with the report in the court file, then they were free to engage a private surveyor to conduct a fresh survey on the land in the presence of all of them and thereafter file a report in court within 30 days. The matter was set for mention for the 19<sup>th</sup> April 2018.

14. On the 19<sup>th</sup> April 2018, all parties were present, Counsel for the Plaintiff informed the court that although the Defendants had filed their papers, the 2<sup>nd</sup> Surveyor' report was yet to be filed. Counsel further informed the court that parties had complied with the provisions of Order 11 of the Civil Procedure Rules and prayed for a hearing dated in the month of October 2018 as she was proceeding for her maternity leave. The position was confirmed by the State counsel Mr. Ondieki. A hearing date was thus scheduled for the 9<sup>th</sup> October 2018.

15. On the day fixed for hearing, the hearing date having been taken by consent and there being no appearance for the Defendants, the matter proceeded for hearing ex-parte, pursuant to the provisions of Order 12, rule 2 of the Civil Procedure Rules.

#### **Plaintiffs' Case.**

16. The 1<sup>st</sup> Plaintiff testified as PW 1 to the effect that 1<sup>st</sup> Defendant had trespassed into his land known as No. Nyandarua/Ndemi/862 land which he had acquired through an allotment by the Ministry of Land in the year 1982 wherein he was subsequently registered as its proprietor in the year 1992.

17. He produced the following bundle of documents as exhibits to support his evidence:

i. Letter of offer dated 11<sup>th</sup> July 1985, as PF Exhibit 1

ii. Charge dated 11<sup>th</sup> March 1985, as PF Exhibit 2

iii. Charge dated 15<sup>th</sup> June 1989, as PF Exhibit 3

iv. Allotment letter dated 15<sup>th</sup> June 1989, as PF Exhibit 4

v. A Copy of a receipt No V842709 dated 9<sup>th</sup> February 1982 for ksh 325/=, as PF Exhibit 5

vi. A Copy of a receipt No 7564376 dated 24<sup>th</sup> June 2015 for ksh 300/=, as PF Exhibit 6

vii. A letter confirming that he had been shown the property for plot No 862 Ndemi dated 29<sup>th</sup> June 1994, as PF Exhibit 7

viii. A Certificate of outright purchase dated 26<sup>th</sup> March 1990, as PF Exhibit 8

ix. Payments to the Settlement Fund trustee- Invoices dated 13<sup>th</sup> February 1990 and 14<sup>th</sup> February 1990, as PF Exhibit 9 (a) (b)

18. The witness testified that he did not have the original title deed as the same had been surrendered to the Co-operative Bank because he had charged it. He however produced a certified copy of the same as PF Exhibit 10.

19. He further testified that although his parcel of land measured 13.5 hectares as per his title deed, he was not in occupation of the whole piece of land because in the year 2015 the 1<sup>st</sup> Defendant, in the company of a surveyor called Mr. Kinari and a mob of people had trespassed therein and had excised 5 acres from the same thereby placing beacons thereon, without his knowledge.

20. That he had reported the matter to the Land Registrar because the 1<sup>st</sup> Defendant's actions had changed of boundary being that the school's parcel of land No 1366 and his parcel of land shared a common boundary as neighbors.

21. The Land Registrar, vide his summons dated the 3<sup>rd</sup> September 2015, had subsequently summoned parties to meet on the suit site wherein they had obliged. The land Registrar in the company of the Surveyor had gone ahead and surveyed the land. In the month of December of the same year, they had been issued with letters containing the findings of the Land Registrar wherein he had recommended that the boundary remains as it was in the Registry Index Map (RIM). The witness produced the summons dated 3<sup>rd</sup> September 2015 as Pf Exhibit 11 (a) and the Land Registrar's findings dated 17<sup>th</sup> December 2015 as Pf exhibit 11(b).

22. That the Defendants were given a copy of the said finding which they never appealed against. That on the 9<sup>th</sup> June 2016, he had come to learn that the 1<sup>st</sup> Defendant had gone to see the National Land Commission because they were not satisfied with the findings of the Land Registrar, wherein they had been advised to comply with the said Land Registrar's decision.

23. The witness produced the findings of the Nyandarua County and Management Board dated 10<sup>th</sup> June 2016 as Pf exhibit 12.

24. He testified that the school management, not being satisfied with the outcome and instead of addressing the issue amicably, had mobilized a mob who went to the suit land, destroyed the fence, cut down trees whereby the erected their own fence using the said cut trees. He reported the matter to the police at Kipipiri station and was given an OB No 26/18/6/2016.

25. That he had thereafter reported the matter to the forest office wherein an officer by the name of SG. Kinyanjui had visited the suit land, calculated the value of the damaged trees and made a report dated the 8<sup>th</sup> August 2016 which he produced as Pf exhibit 13(a) showing the value of the cut trees at Ksh 763,000/=. He also produced Photographs of the destroyed trees as Pf Exhibit 13(b).

26. That after he had reported the matter to the police, and they had visited the scene and cooled down the mob, he had decided to follow the legal channel wherein he had served notice to the 1<sup>st</sup> Defendant through the school management.

27. The witness testified that this suit was first filed at the Magistrate's Court at Engineer Law Court wherein, for lack of jurisdiction, the matter had been transferred to Naivasha Law Court and filed as Case No 108 of 2016. He had attached the proceedings from these courts as part of the pleadings herein.

28. That following the transfer to Naivasha Law Court, the matter had further been transferred to Nakuru vide Misc Application No. 257 of 2016 but upon the establishment of the Nyahururu Environment and Land Court, the matter was transferred therein to which the court directed that the District surveyor visits the suit land.

29. Further evidence was that on the 12<sup>th</sup> October 2017, the land surveyor had visited the suit land wherein he had confirmed that Magomamo School had excised 5 acres of his land and was still in occupation of the same, land which he had not donated to the school. That the school had neither developed the said piece of land nor were they utilizing the same, although they had put up the fence.

30. He prayed for orders of eviction of the school from his land. That the school, at its own cost, returns the boundary as directed by the Land Registrar, and further that they pay for the cut down trees as prayed in the plaint.

31. That he was allotted his land before the school and was not claiming any part of parcel No. 1366, land which belonged to the school.

32. The next witness PW2 was the 2<sup>nd</sup> Plaintiff herein who testified that he was the proprietor of six parcels of land having bought the same from one Judy Mukoma in the year 2008. He testified that he had forgotten to bring the same agreement which was at his home. That notwithstanding, he proceeded to testify that he had been registered as the proprietor of his parcels of land in the year 2009 save for one parcel of land No 5080 which had been re-registered in the year 2015 after he had returned its title so as to rectify an anomaly on the same.

33. His evidence was that after he had bought the parcels of land, he had fenced them but the Defendant's had started interfering with them in the year 2015 wherein they had removed his fence and put theirs, thereon.

34. He produced all the six original titles to land parcels No. Nyandarua/Ndemi/5075, 5076, 5077, 5078, 5079 and 5080 all measuring 0.005 Hectors each.

35. The court compared the original title deeds with the copies wherein it accepted the copies thereof and returned the original title deeds to the witness for safe keeping. The said copies of the title deeds were then produced as Pf Exhibit 14(a-f).

36. That the anomaly on title No 5080 was that it had been drafted as No 5180 instead of 5080. That the year he had discovered about the anomaly on his title was the same year that the 1<sup>st</sup> Defendant had started interfering with his land.

37. That later he had been served with summons dated the 26<sup>th</sup> July 2017 herein produced as Pf exhibit 15, informing him that the District Surveyor would visit the suit land. That summons had also been served to the Magomono Primary School, the area Chief and the 1<sup>st</sup> Plaintiff herein. That the parties had heeded to the summons wherein they had gone to the suit land. The surveyor had attended the meeting and thereafter made a report to the effect that the boundaries on the ground did not match with the Registry Index Map. A finding he had agreed with. He produced the County surveyor's report dated 12<sup>th</sup> October 2018 as Pf exhibit 16 (b)

38. That since the County surveyor had not indicated the trespass by the Defendants, they had decided to engage another surveyor called Africans to visit the suit land and establish the trespass. The said surveyor had found that indeed the school had trespassed on his land.

39. The witness testified that he was present when the Land Registrar and the surveyor had gone to the land wherein some people and taken down the measurements their land. The Land Registrar had then stated that the land should remain as it were in the Registry Index Map.

40. The witness sought for eviction orders against the Defendants from his six (6) acres of land. He also sought for orders that the boundaries of their parcels of land to be restored to their original position at the cost of the Defendants. Lastly, he sought for costs of the suit.

41. The Plaintiffs thus closed their case and filed their submissions on the 16<sup>th</sup> January 2018.

#### **Defendants' case.**

42. Suffice to say that although the Defendants herein did not appear on the hearing day to defend their case wherein the same proceeded ex-parte, I am compelled to consider the statement of defence dated the 29<sup>th</sup> November 2017 and filed on the 4<sup>th</sup> December 2017 together with the documents therein attached.

43. The said statement of Defence was a mere denial. The Documents attached therein being a letter of allotment, Certificate of official search and an area list for Ndemi. The said documents confirm that indeed the Defendant was offered Plot No. 1366 measuring approximately 11.0 Hectares at Ndemi Settlement Scheme in Nyandarua District vide a letter of offer dated the 30<sup>th</sup> January 2006 wherein they were registered as proprietors therein after. Apart for these documents there is nothing authorizing them to trespass on the Plaintiff's land.

The matter was not defended and the same remains as such.

#### **Plaintiffs' submissions.**

44. The Plaintiffs' submissions dated the 16<sup>th</sup> January 2019 was to the effect that they had filed the present suit as proprietors of their respective parcels of land, because the Defendants herein had trespassed on their land and in the process cut down the 1<sup>st</sup> Plaintiff's trees. They therefore sought for the intervention of the court to have the Defendants evicted from their respective parcels of land and for a permanent injunction against them from interfering with the land parcels of land No. Nyandarua/Ndemi 862, 5075, 5076, 5077, 5078, 5079 and 5080 as well as for general damages for the destroyed trees.

45. The Plaintiffs' further submission was that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had been sued in their personal capacity as well as in their capacity as Chairman and Secretary to the Board of Management of Mangomano Primary School.

46. That the Defendants herein had unlawfully and with the help of some hired goons trespassed on their parcels of land and had hived off 12 acres from their parcels of land thereby changing the set boundaries on the ground.

47. The Plaintiffs had sought for the intervention of the Land Registrar on the boundary dispute wherein it had been confirmed that the existing boundaries before the trespass, had concurred with the official map (RIM) and should not be disturbed.

48. The Defendant's dissatisfaction with the Land Registrar's finding had led them to the National Land Commission who also confirmed the findings of the Land Registrar which then led the Defendants to take the law into their hands herein they trespassed into the Plaintiff's parcels of land and hived off 12 acres of land from therein thereby interfering with the fixed boundaries in contravention of Section 20 of the Land Registration Act. That in the process, they had destroyed the 1<sup>st</sup> Plaintiff's trees worth Ksh 763,00/=

49. That the Plaintiffs having proved that they were the registered proprietors of their respective parcels of land, were protected by the provisions of Sections 25 and 26 of the **Land Registration Act**.

50. They relied on the publication of Clerk and Lindell on Torts (7<sup>th</sup> edition) at paragraph 17 which defined trespass as 'an unjustifiable entry buy one person upon land in possession of another. That the entry of the Defendants into the Plaintiffs parcels of land and destroying trees thereon and further their unlawful occupation of the Defendant to date therefore constituted an Act of trespass.

51. That the Defendant's defence to the effect that they were allocated parcel No Nyandarua/Ndemi/1336 but without proof therefore remained a mere averment. That the Plaintiffs evidence was unchallenged, the defendants having chosen to stay away at the hearing date. For these reason, the Plaintiffs prayed that the court allows their suit as prayed.

#### **Analyses and Determination:**

52. I have considered both the oral and documentary evidence adduced in court, the submissions therein as well as the Law. I have also considered that the matter proceeded for hearing ex-parte the Defendants choosing to stay away at the hearing despite have participated in fixing the hearing date.

53. The matters that stand out for determination herein are as follows:

- i. Whether the Plaintiffs are the proprietors of parcel of land No Nyandarua/Ndemi 862, 5075, 5076, 5077, 5078, 5079 and 5080.
- ii. Whether the Defendants trespassed onto the Plaintiffs parcels of land.
- iii. Whether the Defendants are liable for General damages.

54. On the first issue, indeed there is no dispute that the Plaintiffs are the registered **proprietors of their respective suit properties having acquired them under the Registered Land Act (now repealed)**. I note that their properties were registered under the repealed Registered Land Act which is now governed by The Land Act, 2012 and the Land Registration Act, 2012. Indeed the law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

*“the Certificate of Title issued by the Registrar upon registration, 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 the 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*

*b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme*

55. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

56. The import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.

57. The Court of Appeal in the case of **Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR**, held as follows:

*We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.*

58. The Defendants in this case did not provide any evidence to show that the Plaintiffs herein procured their respective parcels of land either illegally, un-procedurally or through a corrupt scheme so as to have their titles impeached.

59. Indeed from the documentary evidence, herein produced by the Plaintiffs, there is no doubt that the 1<sup>st</sup> Plaintiff has proved that he was the registered proprietor of parcel of land No. Nyandarua/Ndemi/862 measuring 13.5 Hectors as at 18<sup>th</sup> December 1992, while the 2<sup>nd</sup> Plaintiff was the registered proprietor of parcels of land No. 5075, 5076, 5077, 5078, 5079 measuring 0.405 Hectors respectively as at 16<sup>th</sup> November 2009 and parcel No Nyandarua/Ndemi/5080 with the same measurements as at 15<sup>th</sup> June 2015 the same having been amended.

60. In light of the above, this court finds that the Plaintiffs have established that they are indeed the duly registered proprietors of their respective suit properties and are entitled to all the rights appurtenant thereto.

61. Having established that the Plaintiffs herein are the registered proprietors of the suit parcels of land, the next issue would be whether the Defendants herein had trespassed on the Plaintiffs' land.

62. From the evidence on record, the Plaintiffs had testified that in the year 2015 the 1<sup>st</sup> Defendant, in the company of a surveyor called Mr. Kinari and a mob of people, had trespassed onto their respective parcels of land wherein they had excised 5 acres from the 1<sup>st</sup> Plaintiff's parcel of land and 6 acres from the 2<sup>nd</sup> Plaintiff's parcel of land respectively, whereby they had proceeded to place beacons thereon, hence changing the fixed boundaries which necessitated them (Plaintiffs) to forward the matter to the Land Registrar.

63. There was evidence that indeed the Land Registrar in the company of a surveyor had visited the suit land, taken measurements and vide his report dated the 17<sup>th</sup> December 2015 (Pex 11 b) stated as follows:

*‘It was found that the boundaries of Plot Numbers 735 and 862 correspond with the RIM.*

*In my view all the three plots in dispute should maintain their boundaries as they are in the RIM as they were before the long of this dispute.’*

64. The Defendants being dissatisfied with the finding of the Land Registrar escalated the matter to the National Land Commission who vide their verdict dated the 10<sup>th</sup> June 2016, (Pf exh 12) adopted the Land Registrar’s decision.

65. Since the Plaintiffs felt that the Land Registrar had not addressed their issues conclusively, on the 14<sup>th</sup> June 2017, they sought an order from court to compel the Land Registrar and the surveyor to visit the parcels of land in dispute, including the Defendants parcel of land, make his finding and file the same in court.

66. A report was filed on the 12<sup>th</sup> October 2017 which report was to the effect that:

*‘Ground measurements for all affected parcels were picked and plotted. It was discovered that the ground was not in correspondence with the RIM (Registry Index Map) with the registered areas of several parcels of land being adversely affected. The broken lines in the field diagram represent the common boundaries whose ground position is not in correspondence with the provisions of the RIM.’*

67. The Plaintiff had a private surveyor Afrikanas Land Surveying and Engineering Ltd visit the suit land and file their report dated the 11<sup>th</sup> April 2018 (Pf exh 16 a) which report collaborated the earlier report filed by the Land Registrar.

68. The diagram therein showed that the Defendants had hived of parcels of land from both the Plaintiffs’ land. The common boundaries on the ground did not correspond with the boundaries in the Registry Index Map.

69. *Sections 18 and 19 of the Land Registration Act* empower the Land Registrar to fix boundaries. Going by the provisions of the law cited above, the Registrar is conferred with the responsibility of determining boundary disputes of registered land and to receive such evidence as is necessary to enable him/her to discharge that responsibility.

70. *The evidence on record is that after the Defendant had interfered with the boundaries herein, the Land Registrar and the Surveyor had visited the disputed suit land on two occasions wherein they had discharged their responsibility by conducting the necessary measurements and receiving the necessary evidence from both the Plaintiff and the Defendant regarding the boundary dispute.*

71. *Their finding* was to the effect that that the ground was not in correspondence with the RIM (Registry Index Map) Indeed the Land Registrar in his report dated the 17<sup>th</sup> December 2015 had recommended that all the three plots in dispute should maintain their boundaries as contained in the Registry Index Map.

72. In light of the foregoing, I see no good reason to contradict the findings of the Land Registrar whose decision was not appealed against by the Defendants.

73. Indeed the simple interpretation of the land Registrar’s finding was that by the actions of the Defendant’s interference with the Registry Index Map, they had actually trespassed onto the Plaintiff’s parcels of land. I find that there being no evidence that the Defendant’s action of entering into the Plaintiffs’ parcels of land and carrying out the impugned activities was lawful or otherwise legally sanctioned, the Defendant’s action therefore constituted trespass to land.

74. It is clear from the Plaintiff’s pleadings that the trespass herein is a continuing one and that owing to the said trespass the 1<sup>st</sup> Plaintiff’s trees worth Ksh 763,00/= were cut down.

75. Trespass is described under the Trespass Act Cap 403 to mean 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.

76. It is trite law that trespass to land is actionable *per se* (without proof of any damage). See the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014)** eKLR where J.M Mutungi J., stated:-

*‘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. ...’*

77. In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013)** eKLR P. Nyamweya J. held:-

*“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the*

*Plaintiff's right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' trespass"*

78. In the circumstances of this case therefore, and since the defendant's occupation of the suit plots is a continuing act which is not denied, the 1<sup>st</sup> Plaintiff vide his Pf exh 13(b) exhibited photographs of the trees that had been cut down as a result of the Defendant's trespass onto his land. He also produced a report dated the 8<sup>th</sup> August 2016 as Pf exhibit 13(a), which report was compiled by a forest office by the name of S.G. Kinyanjui who had visited the suit land, calculated the value of the damaged trees, thereby assessing the value of the cut down trees at Ksh 763,000/=

79. I now make the following final orders :

i. I award an amount of Kshs 100,000/= to each of the Plaintiffs as compensation for the infringement of their right to use and enjoy their respective suit properties occasioned by the 1<sup>st</sup> Defendant's trespass.

ii. I further award the 1<sup>st</sup> plaintiff a sum of Ksh 763,000/- as compensation for the cut down trees.

iii. The net result is that I find and hold the plaintiff's suit against the Defendant has been proved on a balance of probabilities. I accordingly enter judgment in favor of the Plaintiffs as against the Defendants as pleaded in the plaint. Since the Defendants are not in actual occupation of the suit lands herein, the said process of eviction and the reinstatement of the official boundary and boundary marks between LR Nyandarua/ Ndemi/1366 on one part and LR Nyandarua/Ndemi/862, 5075, 5076, 5077, 5078, 5079 and 5080 on the other hand at the Defendant's own cost shall be carried out within 30 days upon the delivery of this judgment

iv. I also award the costs of this suit to the Plaintiffs at a lower scale since the same was undefended.

**Dated and delivered at Nyahururu this 26<sup>th</sup> day of February 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**