

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC CASE NO 69 OF 2021

JAMES MACHARIA MWANGI.....
PLAINTIFF

VERSUS

KENYA RAILWAY CORPORATION.....1ST DEFENDANT
THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 13th September 2021, the Plaintiff herein sued the Defendants herein seeking the following orders:

- a) *A declaration that the 1st Defendant has unlawfully encroached onto the Plaintiff's suit plot of land known as PLOT NO 533/678 MOLO TOWNSHIP by TEN (10) meters.*
- b) *An Order of eviction and demolition, evicting the 1st Defendant by itself and/or its agents, servants or any other person or entity claiming authority from the Defendant from land parcel PLOT NO 533/678 MOLO TOWNSHIP now MOLO TOWNSHIP BLOCK 2/460 and demolition of the illegal fence and/or any other illegal structures erected thereon.*
- c) *An order of permanent injunction restraining the 1st Defendant by itself and/or its agents, servants or any other person or entity claiming authority from the Defendant from the continued act of trespass and/or encroachment*

by way of fencing and demolition and/or destruction of properties developed on the area marked for fencing by the 1st Defendant that affects the Plaintiff's PLOT NO 533/678 MOLO TOWNSHIP now MOLO TOWNSHIP BLOCK 2/460 or in any way whatsoever physically interfering with the current status of the said plot of land.

d) General and Exemplary Damages for trespass.

e) Damages for loss of user as pleaded.

f) Costs of the suit.

g) Interest on (iv), (v) and (vi) above at Court rates.

h) Such other and further relief that the Honourable court may deem fit and just to grant.

PLAINTIFF'S CASE

2. PW1 James Macharia Mwangi adopted his witness statement dated 13th September 2021, as part of his evidence in chief. He further produced lists of documents dated 13th September 2021, 3rd December 2021, 7th February 2023, and 5th July 2023, as PExhb 1 to 36, respectively.
3. PW1 testified that they had a dispute with the 1st Defendant immediately after the suit property was surveyed, whereby the 1st Defendant had encroached on about sixty meters on the western side of his plot to excavate stones. It was his evidence that he wrote a letter to the Railway Station Master asking him to desist from trespassing onto his plot on 18th September, 1998. It was PW1's testimony that he got a warrant of arrest vide a Nakuru CMCC No 2278/98 where the Defendants were Zakariah and Peter Mbuya.

4. PW1 further stated that the 1st Defendant was to pay costs of Ksh 14445/= and promised not to trespass again. He also stated that he had a dispute in 2021, when the 1st Defendant trespassed and fenced a portion of the suit land, measuring about ten meters which has affected him as he cannot utilize it. Further, that he has legal documents in respect of the suit property which were issued regularly, and that the 1st defendant has never challenged the legality of his documents.
5. PW1 testified that Molo Police Station made a claim over the property on the eastern side and urged the court to enter judgment as prayed in the plaint.
6. Upon cross-examination by Ms. Kabaila, PW1 stated that he was not aware whether the 1st Defendant can transfer property, and that he was legally/regularly allocated the property by the Commissioner of Lands, who cannot act on behalf of the 1st Defendant.
7. Upon re-examination by Mr. Ouma, PW1 testified that he appeared before the Commissioner of Lands and produced the letter dated 22nd April 1994, followed the process and was subsequently issued with a certificate of lease. PW1 testified that he was not under any obligation to apply to the 1st Defendant who has never challenged his documents.

1ST DEFENDANT'S CASE

8. DW1 Salome Sari Kamau adopted her witness statement dated 14th November 2022, as her evidence in chief and stated that she is the Senior Surveyor with the 1st Defendant. She produced a list of documents dated 14th November 2022, as DExhb No 1 to 6.
9. DW1 testified that the first survey document, Molo Station yard layout No 9265/1 dated 12th October, 1961 shows that the boundaries of land defined as Molo Railway Station Reserve and Molo go down area which is vested in the 1st Defendant by a Vesting order dated 1986, Legal Notice No. 24, together with the Kenya Vesting of Land Regulations of 1963. She testified that from the station layout, the suit property partly falls within what is defined as Molo Railway Station, which belongs to the 1st Defendant.
10. DW1 further testified that Survey Plan No. 42/170 of 17th December, 1935 defines land boundaries of part of the Molo Station Reserve and from the Survey Plan, the suit property partly falls within the railway property. She further testified that Survey Plan No. 69/160 of 9th July, 1954, shows part of Molo Railway Station Reserve and referred to Survey Plan No. 102/190 of 22nd October, 1964.
11. DW1 testified that the Molo Township Development Plan No. 33 drawing No. 52/54/2 of 29th November, 1964, was approved by the Commissioner of Lands, which shows that the suit property falls within Molo Railway Station. DW1 informed the court that the PDP presented by the Plaintiff is partly within the boundary of Railway land as defined by the 1964 PDP.

12. It was DW1's testimony that from the documents filed by the Plaintiff, it shows that the letter of allotment was issued on 2nd June, 1965, and that the law that was used to allocate land by the Commissioner of Lands was the Government Lands Act. Further, that the Commissioner of Lands did not have the power to allocate land without the consent of public institutions.
13. DW1 further testified that there is no evidence of circulation of consents before the allocation was done by the Commissioner of Lands, and that the 1st Defendant had not surrendered the land to the government for allocation, hence it was unlawfully allocated.
14. According to DW1, there is a letter dated 28th September, 2004 from the Commissioner of Lands to the CID Nakuru admitting that the allocation was partly encroaching on survey works and railway land. DW1 testified that when a PDP is drawn for allocation, it references an older PDP, and that it is not clear whether the PDP of 1994 used to allocate this plot referenced the PDP of 29th November, 1964.
15. DW1 urged the court to dismiss the Plaintiff's suit with costs and the court orders amendment of the PDP No 52/942 of 28th September, 1994 and its subsequent Survey Plan No 265/45 which is the one that implemented the PDP to exclude the part of Molo Railway Service Station reserve. Further that the subsequent registration should capture the amendment.

16. Upon cross-examination by Ms. Mukira, DW1 stated that she is a Surveyor working at the Engineering department of the 1st Defendant and part of the land belongs to the 1st Defendant. She stated that in DExhb 4, there is an LR No 533/309 and in DExhb 5 are LR 533/322 and 533/323 for a residential area. She stated that the survey plans have LR numbers and the station is listed as Molo Station Reserve, and further that the 1994 Development Plan should have referenced the plan for 1964 and that by 1964, the plaintiff's land had not been allocated. DW1 testified that the land defined by the PDP and the survey plan falls partly within the 1st Defendant's land.

17. DW1 informed the court that she saw an application to the Commissioner of Lands, an allotment letter and a Survey Plan, which shows where the plaintiff's land is situated but does not indicate the neighboring parcels. She stated that they have not referred to the Survey Plan of 1996. It was her testimony that FR 42/170, DExhb No 2, overlaps on the earlier PDP which excised part of the station area, of which they were notified when they did a resurvey. DW1 stated that she was aware of the survey plan dated 26th April, 2022 (FR No 670/97) and FR No 265/45 which show the beacons.

18. DW1 stated that the land is part of Molo Railway Station, but the court decree stated that the residential house is not on public land. Further that the vide a Gazette Notice at page 33 of the Plaintiff's trial bundle, the Commissioner of Lands had tried to cancel the Plaintiff's title, but the same was quashed vide an order issued in JR No 79 of 2012 on 23rd April,

2015. (see PExhb No 13.), which is in respect of the same parcel of land. She stated that the 1st Defendant could not encroach on its own land, and that it did not file a counterclaim.

19. Upon cross-examination by Ms. Kabaila, DW1 testified that the Commissioner of Lands is supposed to circulate for comments before allocation of public land.

PLAINTIFF'S SUBMISSIONS

20. Counsel for the Plaintiff filed submissions dated 3rd June, 2025, and identified the following issues for determination:

- a) Whether the suit property belongs to the Plaintiff?*
- b) Whether the Defendant has any legal claim on the suit property?*
- c) Whether the Defendant trespassed on the suit property?*
- d) Whether the Plaintiff is entitled to the orders sought?*
- e) Who bears the costs of this suit?*

21. On the first issue, counsel relied on a letter dated 28th July 1994 where the Commissioner of Lands, forwarded a sketch plan showing, sites approval and allocation of the Provincial Planner through the Director of Physical Planning; letter dated 28th September 1994, by the Director of Physical Planning forwarding to the Commissioner of Lands (PDP No. R52/94/2) in triplicate for final approval, allotment letter dated 2nd June 1995, where the Plaintiff accepted the offer, paid the requisite fees, land surveyed, issued with a lease dated 2nd April 2001 and subsequently a certificate of lease dated 19th February 2002 was issued to the Plaintiff.

22. Counsel further relied on Civil Suit No. 477 of 2004 and Judicial Review No. 79 of 2012, where the court decreed that the Plaintiff is the lawful owner of the suit land and quashed gazette Notice No. 8653 published on 29th June 2012 in respect of the suit land LR No 533/678.
23. Counsel relied on Section 26 of the Land Registration Act, 2012 and the following cases: **Njogu vs Sibashi (Environment & Land Case 12 of 2018) [2024] KEELC 1643 (KLR), Muthiora vs Marion Muthama Kiara (Suing on Behalf of the Estate of Erastus Muthamia Kiara-Deceased) Civil Appeal 43 of 2017) [2022] KECA 28 (KLR), Muthamia vs Tana Water Works Development Agency KEELC 947 (KLR), Nakuru High Court Misc Civil Application No 79 of 2012, Muna & 5 others vs Boscardin & 5 others [2022] KEELC 3133, William Koross (Legal Representative of Elijah C.A Koross) vs Hezekiah Kiptoo Komen & 4 others [2015] KECA 906 (KLR), Ndolo vs Reuben & 72 others [2023] KEELC 21521 (KLR), Mbuthia Macharia vs Annah Mutua Ndwiga & Another [2017] eKLR, Mako Abdi Dolal vs Ali Duane & 2 others [2019] KEELC 4929 (KLR), Ahmed vs Wamalwa (Sued as the Legal Representative of the Estate of Cornelius Wanyonyi Wamalwa- DCD & 5 Others (Environment & Land Case E003 of 2022) [2024] KEELC 4772.**
24. On the second issue, counsel submitted that the 1st Defendant encroached on the Plaintiff's private land by felling trees, digging holes, constructing

a fence and depriving the Plaintiff of his proprietary rights. Counsel relied on the definition of trespass and submitted that the 1st Defendant's acts amounted to trespass and cited the case of **Muthiora V Marion Muthama (supra)**.

25. On the third issue, counsel submitted that the Plaintiff is entitled to the orders sought and relied on the cases of **Nakuru Industries Limited vs S.S Mehta & Sons [2016] eKLR** and **Catholic Diocese of Malindi Registered Trustees vs Katana & 2 others KEELC 18335 (KLR)**, and urged the court to enter judgment as prayed in the plaint with costs.

1ST DEFENDANT'S SUBMISSIONS

26. Counsel for the 1st Defendant filed submissions dated 18th July, 2025, and identified the following issues for determination:
- a) Whether the Plaintiff acquired the suit property lawfully and procedurally?*
 - b) Whether the 1st Defendant was consulted or gave consent prior to the allocation of the suit property?*
 - c) Whether the Part Development Plan relied on by the Plaintiff was valid and enforceable?*
 - d) Whether the matter herein is Res-judicata?*
 - e) Whether the Plaintiff is entitled to ownership, possession or occupation of the suit property?*
 - f) Whether the Plaintiff's acquisition contravenes public interest and statutory protections for public land?*

27. On the first issue, counsel submitted that the Commissioner of Lands who allocated the suit property to the Plaintiff ignored statutory safeguards and did not act within legal precincts, as he had no authority to allocate land belonging to the 1st defendant.

28. Counsel relied on the cases of **James Joram Nyaga & Another vs Attorney General & Another [2007] eKLR**, **Milankumarn Shar & 2 others vs City Council of Nairobi & Others, Nairobi HCCC No 1024 of 2005**, and **Funzi Island Development Ltd & 2 others vs County Government of Kwale & 2 others (2014) eKLR**.

29. On the second and third issues, counsel submitted that the land cannot be said to have been allocated where the foundational planning instrument was not subjected to legal scrutiny, transparency or stakeholder approval particularly from the 1st Defendant, the lawful custodian of the land. Counsel relied on Article 40 of the Constitution of Kenya and submitted that the failure to circulate the PDP invalidates the foundation of the Plaintiff's allotment.

30. Counsel further submitted that the Plaintiff relying on Judicial review orders as conferring ownership is fundamentally misconceived and legally untenable as Judicial review is supervisory in nature and cannot confer ownership. Judicial review orders are meant to quash unlawful decisions and compel lawful action but not to transfer rights.

31. On the fourth issue, counsel submitted that *res-judicata* does not apply as the 1st Defendant was not a party to the earlier suits relied upon by the Plaintiff and cannot be used to deprive the 1st Defendant the opportunity to present its case.

32. On the fifth issue, counsel submitted that the failure by the Plaintiff to ascertain that the Commissioner of Lands had authority to allocate land under the 1st Defendant's jurisdiction renders the entire claim defective. On the sixth issue, counsel submitted that any lease granted over land vested in the 1st Defendant without proper legal authority or consultation is fatally defective. Counsel relied on Article 40 (6) of the Constitution of Kenya and the case **of Ogondo (Suing as the Administratrix of Salmon Ndoto Obode) vs Kenya Railways Corporation & Others [2022] KEELC 13367 (KLR)**.

33. Counsel urged the court to dismiss the Plaintiff's suit with costs, declare the allocation and/or acquisition of Plot No 533/678, Molo Township null and void, and order the Plaintiff to vacate the suit property.

ANALYSIS AND DETERMINATION

34. The issues for determination are:
 - a) *Whether the Plaintiff acquired the suit property lawfully and procedurally?*
 - b) *Whether the 1st Defendant has trespassed on part of the suit property*
 - c) *Who pays the costs of the suit?*

35. The history of the suit property as per the pleadings, the documents produced and the evidence on record show that the Plaintiff and the 1st Defendant have had a protracted dispute in respect of 10 meters of suit land.

36. It was the Plaintiff's case that the 1st Defendant trespassed onto the suit land by approximately 10 meters and unlawfully erected a fence thereon. It was his evidence that he is the legal owner of the suit land. The Plaintiff listed the particulars of trespass as follows:

a) Unlawfully and/or illegally claiming proprietary rights over land parcel PLOT NO 533/678 MOLO TOWNSHIP now MOLO TOWNSHIP BLOCK 2/460.

b) Entering onto the portion of land parcel PLOT NO 533/678 MOLO TOWNSHIP now MOLO TOWNSHIP BLOCK 2/460 fencing the same and erecting a fence thereon without the consent of the Plaintiff.

c) Declining to surrender the suit parcel to the Plaintiff thereby denying and/or restricting his use and/or physical occupation thereof.

d) Deliberately and willfully trespassing onto the Plaintiff's suit property without conducting due diligence to ascertain the current status of the suit property.

37. The 1st Defendant denied the allegations and stated that it cannot trespass on its own land. The 1st Defendant further claimed that the Plaintiff

circumvented and/or bypassed the procedure for allocation of the suit land as required under Section 16 of the Kenya Railway Act.

38. According to the 1st Defendant, the suit land is public land and that the Part Development Plan referred to by the Plaintiff for allocation was not circulated for comments to the 1st Defendant hence the same was irregular.

39. In **Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923**, trespass to land is defined as follows:

"Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another."

40. The text further discusses at page 927, who may sue for trespass as follows:

"Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both... Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner."

41. It follows that a claimant must establish ownership of land to sustain a claim for trespass. It is enough that the person suing is in possession. The evidence on record is that the Plaintiff is the one in possession of the suit

land and the 1st Defendant's act of fencing 10 meters of the land has inconvenienced the Plaintiff.

42. In the case of **Charles Ogejo Ochieng vs. Geoffrey Okumu [1995] eKLR**, the court held that:

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

43. The Plaintiff, in a bid to demonstrate the root of his title, gave an elaborate background on how he acquired the suit land. The Plaintiff stated that he made an application for allocation and vide a letter dated 28th July 1994, the Commissioner of Lands forwarded a sketch plan showing, sites approval and allocation of the Provincial Planner through the Director of Physical Planning; which was followed by a letter dated 28th September 1994 by the Director of Physical Planning forwarding to the Commissioner of Lands (PDP No. R52/94/2) in triplicate for final approval, and later an allotment letter dated 2nd June 1995, was issued to the Plaintiff. The Plaintiff also stated that he accepted the offer, paid the requisite fees, land was surveyed, thereafter he was issued with a lease dated 2nd April 2001 and subsequently a certificate of lease dated 19th February 2002.

44. In the case of **Mwangi v Njari a [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.

45. The 1st Defendant put up a spirited fight on the ground that the Commissioner of Lands did not have powers to allocate land without the consent of public institutions, like the Defendant but was not able to explain that there was a decree of the court that had stated that the suit land was not public land.
46. The court also quashed a Gazette Notice No. 8653 published on 29th June 2012, in respect of the suit land LR. No. 533/678, vide Judicial Review No 79 of 2012. The 1st Defendant also admitted that it was aware that the court decreed that the plaintiff was the lawful owner of the suit land in Civil Suit No. 477 of 2004 which has never been set aside.
47. Section 24 of the Land Registration Act provides that subject thereto:
 - 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***

b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.

48. Section 25 of the Land Registration Act states as follows:

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

49. Section 26 states as follows:

“(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”.

50. There was no evidence that the Plaintiff acquired the title to the suit land fraudulently or through misrepresentation. The Defendant claimed that the Plaintiff had acquired the title unprocedurally but did not prove the illegality.

51. The Defendant admitted to having fenced part of the suit land in the belief that the same was part of public land reserved for the Railway Station. The Plaintiff had claimed general damages for trespass. Trespass is actionable *per se* as was held in the case of **Duncan Nderitu Ndegwa – vs- Kenya Pipeline Company Ltd & another [2013] eKLR**, that:

“On the issue of quantum of general damages 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 Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass."

52. Similarly, in the case of **Paul Audi Ochuodho v Joshia Ombura Orwa (2014) eKLR**. Okong'o J stated that:

"The defendant having been proved to have entered the suit property without the permission of the proprietor or any lawful cause, the defendant is a trespasser on the suit property and the plaintiff is entitled to judgment against the defendant for an injunction to restrain the defendant from committing further acts of trespass. The plaintiff is also entitled general and special damages arising from such trespass."

53. The Plaintiff claims general damages for trespass. In the case of **Bhagwani Singh Kalsi v National Housing Corporation [2017] KEELC 391 (KLR)**, this court held as follows:

"The question of general damages for trespass is well settled. Once trespass is established or proved, then a party need not prove that he suffered any damage or loss. It is trite law that trespass to land is actionable per se. The plaintiff prayed for general damages for the loss occasioned by the defendant who had encroached on his suit land. Having determined that the defendant is a trespasser it follows that it should pay damages. It is at the discretion of the court to assess the reasonable

damages to be awarded to the plaintiff. The court can take into account amongst other factors the length of time of the illegal occupation, nature of the trespass and whatever the trespasser was doing on the land. The discretion must however be exercised judiciously to meet the ends of justice.”

54. The Plaintiff and the Defendant have had a protracted case in respect of the suit land. The Plaintiff gave evidence and I find that he has proved his case and I therefore issue the following orders:

a) A declaration is hereby made that the 1st Defendant unlawfully encroached onto the Plaintiff’s suit plot of land known as PLOT NO 533/678 MOLO TOWNSHIP by TEN (10) meters.

b) An Order of eviction and demolition is hereby issued to the 1st Defendant by itself and/or its agents, servants or any other person or entity claiming authority from the Defendant from land parcel PLOT NO 533/678 MOLO TOWNSHIP now MOLO TOWNSHIP BLOCK 2/460 and demolition of the illegal fence and/or any other illegal structures erected thereon.

c) An order of permanent injunction is hereby issued restraining the 1st Defendant by itself and/or its agents, servants or any other person or entity claiming authority from the Defendant from the continued act of trespass and/or encroachment by way of fencing and demolition and/or destruction of properties developed on the area marked for fencing by the 1st Defendant that affects the

Plaintiff's PLOT NO 533/678 MOLO TOWNSHIP now MOLO TOWNSHIP BLOCK 2/460 or in any way whatsoever physically interfering with the current status of the said plot of land.

d) General Damages of Kshs. 500,000/ is hereby awarded to the Plaintiff plus costs of the suit to be paid by the 1st Defendant.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF OCTOBER 2025.

M. A. ODENY

JUDGE