

4. The Defendant dug a big trench around the land to prevent his workers from accessing the land. He cut down trees which were on the land. When the Plaintiff approached him, the Defendant was so rude. He reported him to police but he did not cooperate.
5. The Plaintiff called Monica Nzula Mwaiwa who had sold the land to him. She stated that the Defendant is her brother in law and that the land which she sold to the Plaintiff is not family land. She purchased the land jointly with her husband who had since passed on.
6. The Plaintiff also called PW3 Mutie Mwangi one of the registered owners of LR. No. Nzaui/Nziu/41 which measures about 18.3 acres. He stated that he and his co-owners sold 3.29 acres to the late Mwathi Nzivu and his wife Monicah Nzule Mwaiwa but they are yet to subdivide the land and transfer the sold portion to the purchaser. He stated that they do not have any claim to the sold portion.
7. The parties were directed to put in written submissions. The Plaintiff filed his submissions dated 11th April, 2025. The Defendant filed his submissions dated 28th July, 2025.
8. The Plaintiff submitted that as the Defendant did not tender any evidence during the hearing, his averments in the defence remained mere allegations without any probative value. He relied on the case of **Janet Kaphiphe Ouma & Another –vs- Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** where Ali Aroni J. (as she then was) cited the decision in **Edward Muriga Through Stanley Muriga –vs- Nathaniel D. Schulter Civil Appeal No. 23 of 1997** where it was held that the Defendant’s statement of defence was mere allegations for failure to adduce any evidence in support of assertions made therein.
9. The Plaintiff submitted further that he had proved that he purchased the land from Monica Nzula Mwaiwa. He further submitted that he had proved that the Defendant had trespassed into the land. He relied on the case of **Charles**

Ogejo Ochieng –vs- Geoffrey Okumu (1995) eKLR where it was held that trespass is an injury to a possessory right.

10. The Defendant submitted that Monica Nzula Mwaiwa had no capacity to sell the land to the Plaintiff. He relied on the case of **Isaya Masira Momanyi – vs- Daniel Omwoyo & Another (2017) eKLR** where it was stated that a sale conducted by a person without a grant of representation is null and void.

11. On the issue of trespass, the Defendant submitted that he was staying on his brother's land pending succession process and that he was therefore not a trespasser. He further submitted that he failed to tender his evidence during the hearing because he was messed by his previous lawyers and that the court should consider his failure to testify as a technicality which is curable under Article 159 of the Constitution.

12. I have carefully considered the evidence which was adduced by the Plaintiff. This evidence is uncontroverted. The Plaintiff produced a sale agreement between him and Monica Nzula Mwaiwa. He called the seller and another witness pw3 Mutie Mwangi who testified that he was a co-owner of LR No. Nzui/Nzui/41 and that they had sold 3.29 acres to Monica Nzula Mwaiwa and her husband. The land is yet to be subdivided. The land having not been subdivided and transferred to the purchasers and Monica Nzule Mwaiwa having been one of the co-purchasers, she cannot be said to lack capacity to sell the land.

13. The Defendant has no interest in the land and he is clearly a trespasser to the land. I therefore find that the averments in the defence are mere allegations and submissions cannot take the place of evidence. I therefore find that the Plaintiff has proved his case on a balance of probabilities. The Defendant is a trespasser to the 3.29 acres and the Plaintiff is entitled to general damages for trespass which is actionable per se. I therefore assess damages for trespass in the sum of Kshs.500,000/=.

14. I therefore enter judgment for the Plaintiff against the Defendant as follows:

- a. A permanent injunction restraining the Defendant and/or his agents and/or servants and/or any other person acting under him, from trespassing into and/or invading and/or interfering with the 3.29 acres comprised in LR No. Nzau/Nziu/41 which was purchased on 30th September, 2017 from Monica Nzula Mwaiwa.
- b. General damages of Kshs.500,000/= with interest at court rates from the date of judgment until payment in full.
- c. Costs and interest of the suit.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH NOVEMBER, 2025.

IN THE PRESENCE OF:

Mr. Asiyo for Mr. Nzavi for Plaintiff.

Court assistant – Steve Musyoki