

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC EP NO. E004 OF 2024**

**ROBERT NGANGA KIGATHI.....1<sup>ST</sup> PLAINTIFF**

**DAVID NJUGUNA KIGATHI.....2<sup>ND</sup> PLAINTIFF**

**FLORENCE WARUGA KIGATHI.....3<sup>RD</sup> PLAINTIFF**

**JEAN NYAMBURA KIGATHI.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**ALFRED KAMAMI KIGATHI.....DEFENDANT**

**JUDGEMENT**

1. The 1<sup>st</sup> -4<sup>th</sup> Plaintiffs filed this suit against the Defendant vide Plaint dated 1<sup>st</sup>

March 2024 seeking for the following orders;

**a) A declaration that the subdivision of parcel Ngong/Ngong/1445 was lawfully and fairly done;**

**b) An eviction order against the Defendant from part of the suit property, No. Ngong/Ngony/ 94240 within fourteen days of the making of the order herein;**

**c) An order that the Defendant do remove or demolish or pull down any and all structures that are trespassing or encroaching on the 3rd and**

- 4th Plaintiffs parcel of land known as Ngong/Ngong/ 94240 within fourteen days of the making of the order herein and failure to do so the Plaintiffs be at liberty to do the same at the Defendant's costs;**
- d) An order of permanent injunction to restrain the Defendant whether by himself, his agents, servants, employees or any person acting under the Defendant's mandate or authority or direction from trespassing or encroaching or entering or constructing or erecting or developing or in any way howsoever from interfering with the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs ownership, use and possession of all that parcel of land known as parcel number Ngong/Ngong/ 94240;**
  - e) The OCS Ngong Police Station do ensure compliance with the orders of the court;**
  - f) Surveyor's costs**
  - g) Contractor (Fence) expenses**
  - h) Costs of this suit;**
  - i) Interests on (f) above**
  - j) Any other relief the court deems fit to grant.**

2. The Plaintiffs stated that together with the Defendant, they are all beneficiaries of the estate of the late James Kigathi Gitaru. Following the death of Mr Gitaru, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs obtained and executed a confirmed grant of letters of

administration of his estate in Succession Cause 1565 of 2015. The land parcel Ngong/Ngong/1445 was to be held by the administrators in trust for all beneficiaries in equal shares.

3. The property was subsequently surveyed and subdivided into six equal portions, resulting in titles Ngong/Ngong/94236 to 94241 issued to the respective beneficiaries.
4. The Plaintiffs stated that during the survey, it was discovered that the Defendant had erected a temporary structure on the original parcel in a position that interfered with equal subdivision. After subdivision, the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs became the joint owners of parcel Ngong/Ngong/94240 by way of transmission, while the Defendant became the owner of parcel Ngong/Ngong/94241.
5. It the Plaintiffs' contention that they requested the Defendant to remove the portion of his temporary wooden house that encroached three feet into their land to enable them to fence and develop their parcel, but the Defendant refused to comply.
6. The Plaintiffs further stated that as a result of the Defendant's continued encroachment which constitutes trespass, it has caused them loss and damage, including loss of use, degradation of their land, and obstruction of development. They assert that their title is indefeasible and seek to restrain the Defendant from further interference. They affirm that no other suit exists between them and the

Defendant regarding the same subject matter, aside from ELC No. 79 of 2019, which has already been determined.

7. The Defendant filed a statement of defence dated 16<sup>th</sup> May 2024 admitting being a beneficiary of the deceased's estate and confirming the subdivision of the original parcel, Ngong/Ngong/1445. He adds that his family has lived on the land for over forty years, having been shown where to build by his late father.
8. He denies knowledge of the survey exercise that preceded the subdivision and disputes the Plaintiffs' description of his structures as temporary, stating they are long-standing family developments. He further asserts that the subdivision was carried out without notifying him or any of his family members, resulting in a boundary line being cut through his sole residence.
9. The Defendant explains that he only learned of the encroachment after subdivision when the Plaintiffs demanded demolition of the affected portion. To protect his home, he filed MC.ELC No. 79 of 2019 seeking cancellation of the subdivision and a resurvey, and he obtained an injunction stopping demolition. However, the case was dismissed for lack of jurisdiction. A subsequent application in the High Court family division was also dismissed on jurisdictional grounds, leaving him with no judicial remedy. As a result, he decided to comply and relocate his home.
10. The Defendant states that he began constructing a new house because demolishing only the encroaching portion would compromise the entire structure. In February

2024, he requested eleven months to complete the new house so he could vacate the affected area, but instead of receiving a response, he was served with the present suit. He denies refusing to move and maintains that he is in the process of relocating.

### **Evidence**

11. Ms Florence Waruga, the 3rd Plaintiff testified as PW1 and adopted her written statement dated 2<sup>nd</sup> November 2024 as evidence in chief. She also produced documents as PExh1-14 as per the list dated 1.3.2024 and supplementary list dated 13<sup>th</sup> January 2025 as PExh 15 and 16. She stated that since 2019, they were awarded property pursuant to the succession of the estate of their mother, and the defendant occupies part of what belongs to them.
12. The witness avers that when they tried to fence the whole land, he blocked them. Thus, they are asking the court to compel the defendant to vacate the premises. That the structure encroaching is a mabati house built when she was a kid with the support of their mother thus has been there for 30-40 years.
13. In the written statement PW1 stated that after receiving their title, the Plaintiffs asked the Defendant to remove the portion of the structure encroaching three feet into their land so they could fence and develop it, but he refused. The Plaintiffs state that this encroachment has caused them loss of use, degradation of their land, and financial expenses for surveying and fencing. They assert that their title is

indefeasible and the Defendant's continued occupation is illegal and intended to dispossess them.

14. Rachel Nyokabi Karanja, the wife of the Defendant gave evidence as DW1 when she adopted her written statement dated 16.10.2024. She explains that when they met with the defendant, he was already living on LR No. Ngong/Ngong/1445. That he had long built a home on land owned by his father, which parcel measured seven (7) acres. She asserts that they were the only ones residing there.

15. After the father-in-law's death, the land was shared equally between the Defendant and his siblings through a certificate of confirmed grant. That in August 2019, while she was away, she was called home by the Area Chief. She came and found police officers, elders, and her brothers-in-law, who informed her that the land had already been subdivided without the Defendant or his representatives being involved.

16. Later, she learned that part of their house fell on the Plaintiffs' parcel and they were required to demolish it. Despite earlier assurances from the Chief that their home would not be interfered with. The Defendant's attempts to offer alternative land to compensate for the developed area were rejected, leading him to file a case at Ngong law Courts vide MC.ELC No. 79 of 2019, which was dismissed.

17. It is Dw1's evidence that the Defendant has since begun building a new home to move into and to demolish the current one. However, the Plaintiffs declined to grant more time and instead filed this suit.

18. The Defendant, Alfred Kamami Kigathi testified as DW2 and adopted his written statement dated 16th October 2024 as his evidence in chief. He produced bundles of documents contained in the lists dated 16/10/2024 and 10/7/2025 as Dexh 1- 11. He stated that after the grant was issued, no one told him about the subdivision, which was done without consideration of his house, which already existed.

19. That his complaint was undertaking the subdivision without involving him noting that the impugned house was in place for over 40 years. He stated that he has obtained approvals to construct another house and that construction will require approximately 18 months. He denied the alleged trespass, as the boundary was drawn across an existing house during the subdivision. He reiterated that he is actively working to relocate his family and remove the encroachment.

**Submissions:**

20. The Plaintiffs and the Defendant both filed submissions dated 8<sup>th</sup> August 2025 and 2<sup>nd</sup> September 2025 respectively. The Plaintiffs submitted that the core argument in this case is whether the Defendant's structure constitutes continuous trespass. They relied on the case of **Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited [2019] Eklr**, which defined continuous trespass as,

**"an intrusion by a person into the land of another who is in possession and ownership".**

21. They submit that they have established their right to sue based on the principle from **Charles Ogejo Ochieng v Geoffrey Okumu [1995] eKLR**, which states that the proper party in a trespass action is the person who has title to the land. Further, citing **Musau v Mutata & another [2023]**, the Plaintiffs submit that the tort of trespass is complete by either entering the land of another or, as is the case here, "remaining on the land or placing or projecting any object upon it" without consent.
22. The Plaintiffs contend that this encroachment, regardless of its size, is a material and unlawful interference that prevents them from developing or enjoying their property. Consequently, they seek a mandatory injunction to compel the removal or demolition of the encroaching structure and an order of eviction against the Defendant.
23. In support, they cited the case of **Wabwire & another... v Origi [2022]**, where the court held that it is "enjoined... to protect the plaintiffs' property rights" by directing the demolition of illegal structures, and **Willy Kipsongok Morogo V Albert K. Morogo (2017) eKLR**, which protected the registered owner's interests.
24. The Plaintiffs also seek damages, specifically pleading for mesne profits, the profits the Defendant received or might have received from the wrongful

occupation. They support their argument with the decision in **Attorney General v Halal Meat Products Limited [2016] eKLR** on the right to mesne profits for wrongful deprivation of property and **Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020]** for the proposition that a court can only award either mesne profits or general damages for trespass, but not both.

25. The Defendant on the other hand submits that he did not trespass on the Plaintiffs' land within the meaning of Section 3 of the Trespass Act, which requires a deliberate and unlawful entry onto another's land. He states that he built his home more than forty years ago on the original parcel, with his late father's permission, long before the land was subdivided and before the Plaintiffs acquired title in 2019.

26. He maintains that the subdivision boundary "found him" living there, and therefore the encroachment was not intentional. He further argues that the Plaintiffs have not shown that he deliberately entered their parcel or carried out any trespassory acts after they acquired ownership.

27. The Defendant asserts that he took immediate steps upon learning of the encroachment, including filing a suit in the Ngong Law Courts. Later, he sought remedies in the High Court to reverse or correct the subdivision through a resurvey. When both attempts failed for jurisdictional reasons, he began constructing a new house to relocate to and demolish the encroaching structure.

28. He claims he has acted diligently, obtained building approvals, and even wrote to the Plaintiffs requesting time to complete his new home, but instead of cooperating, the Plaintiffs filed the present suit. On reliefs and costs, the Defendant submits that the Plaintiffs have failed to prove trespass and therefore are not entitled to the orders sought.

29. He maintains that his actions were neither malicious nor negligent, and that he has consistently shown willingness to move, only requesting reasonable time to do so. Consequently, he argues that the suit was unnecessary and the Plaintiffs should bear the costs.

**Analysis and Determination:**

30. Having reviewed the pleadings, the evidence tendered on record and the submissions filed by both parties, it is my view that the following questions arise for determination:

*a) Whether the subdivision of land parcel Ngong/Ngong/1445 was lawful?*

*b) Whether the Defendant is trespassing on parcel Ngong/Ngong/94240 registered in the names of the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs?*

*c) Whether the Plaintiffs are entitled to the reliefs sought?*

**a) Whether the Subdivision of Ngong/Ngong/1445 Was Lawful?**

31. It is not disputed that the original parcel Ngong/Ngong/1445 formed part of the estate of the late James Kigathi Gitaru and that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were duly appointed administrators in Succession Cause No. 1565 of 2015. The certificate of grant directed that the property be shared equally among the listed beneficiaries.

32. The Defendant conceded in his defence and testimony that the land was subdivided pursuant to the certificate of grant of the estate and that titles Ngong/Ngong/94236 to 94241 were issued to the respective beneficiaries. No evidence was tendered to demonstrate that the distribution as per the certificate of grant was revoked, annulled, or varied in accordance with Sections 76 and 93 of the Law of Succession Act.

33. The Defendant having affirmed that his attempts to cancel the subdivision were unsuccessful, it is therefore my view, and I so hold that the subdivision was lawful, having been undertaken in execution of a valid court order.

**b) Whether the Defendant is a trespasser:**

34. The 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs produced a certificate of title for parcel Ngong/Ngong/94240 obtained by way of transmission. Under **Section 24 and 25 of the Land Registration Act**, a certificate of title issued by the Registrar is prima facie evidence that the person named therein is the absolute and indefeasible owner, subject only to encumbrances, fraud, or illegality, none of which were pleaded or proved in this case.

35. Trespass to land has been defined as any unjustifiable intrusion by one person upon land in the possession of another. In **Rhoda S. Kiilu v Jiangxi Water and Hydropower Construction (K) Ltd [2019] eKLR**, the court held that trespass includes remaining on land or placing any structure thereon without the consent of the registered owner. Similarly, in **Musau v Mutata & another [2023] eKLR**, the court affirmed that trespass is a continuing tort so long as the unlawful occupation persists.

36. The Defendant admits that a portion of his house encroaches onto the Plaintiffs' parcel. His defence is that the structure predated the subdivision therefore he did not deliberately enter the Plaintiffs' land. This line of defence is corroborated by the evidence adduced by both sides as the Plaintiffs affirms the existence of a structure before the subdivision. The only bone of contention being whether the structure is comprised of temporary materials or permanent.

37. Despite the evidence that the Defendant did not intentionally trespass in the ordinary sense. However, once the subdivision was completed and titles issued, any continued occupation by the Defendant on parcel Ngong/Ngong/94240, without the consent of the registered proprietors, became unlawful. Hence the Defendant's continuous occupation of the impugned portion amounts to trespass on the Plaintiffs' land.

**c) Whether the Plaintiffs are entitled to the reliefs sought**

38. Having found that the Plaintiffs are the registered owners and that the Defendant's structure is encroaching on it, it follows that the Plaintiffs are entitled to protection of their proprietary rights under Article 40 of the Constitution and Sections 24 and 25 of the Land Registration Act.

39. Ordinarily, a case of trespass would warrant an eviction order and a mandatory injunction for demolition of encroaching structures. However, the grant of such reliefs is discretionary and must be exercised judiciously, guided by the interests of justice and equity.

40. In the present case, I consider the following undisputed circumstances; the Defendant has lived on the original land for over forty years with the now encroaching structure in existence before the subdivision. It was not erected in defiance of the Plaintiffs' title, and upon learning of the encroachment, the Defendant stated that he sought legal redress and, when unsuccessful, commenced construction of an alternative residence. Thus, the Defendant has demonstrated willingness to vacate and only sought reasonable time to do so.

41. Article 159(2)(d) of the Constitution enjoins courts to administer justice without undue regard to technicalities, while equity requires that relief be proportionate and humane. In **Sisto Wambugu v Kamau Njuguna [1983] KECA 69 (KLR)**, the Court of Appeal emphasized that remedies relating to land should be fashioned in a manner that avoids unnecessary hardship where rights can still be vindicated.

42. Granting the Defendant time to vacate will not extinguish the Plaintiffs' rights but will merely regulate the manner of enforcement. The Plaintiffs' ownership remains intact, and the trespass will come to an end upon expiry of the granted period for the Defendant to vacate the suit property.

43. In the circumstances, I hold that the Plaintiffs have proved their case on a balance of probabilities in respect of some of the prayers sought, which are granted. Accordingly, I enter judgment for the Plaintiff in terms of **prayers (a) to (c)** of the plaint. However, in the interests of justice and equity, it is appropriate to grant the Defendant sufficient time to complete the house and relocate.

44. Therefore, **orders (a) to (c) are not executable for a period of six (6) months** from the date of this judgment, during which the Defendant is directed to vacate the portion of land parcel Ngong/Ngong/94240 and to remove the offending structures. Upon expiry of the said period, if the Defendant has not complied, the Plaintiffs shall be at liberty to evict him and demolish the offending structures at the Defendant's costs. Upon execution of the order for vacant possession, an order of permanent injunction is issued in terms of **prayer (d)** of the reliefs.

45. No evidence was presented to show that the Defendant had demolished the Plaintiffs' fence hence I find no basis for granting the prayer for paying the contractor's fee. Equally, there was no evidence led on how or who was to meet the cost of surveying. If it is a matter arising, it should be dealt with in the

succession proceedings. Consequently, **prayers (f) and (g) of the plaint are dismissed.**

46. Each party to meet their respective costs of the suit.

**Dated, Signed and Delivered at Nairobi this 18<sup>th</sup> day of December, 2025**

**A. OMOLLO  
JUDGE**

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