



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CIVIL SUIT NO. 177 OF 2018

RONALD **KIMEU**
KITULI.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....
DEFENDANT

JUDGMENT

Background of the case

1. This suit was instituted through the plaintiff's plaint dated 7/09/2018, where he stated that at the time the sale agreement was made between him and the now-defunct Mutuu Town Council ("**Council**"), which was the predecessor of the defendant, he was the beneficial owner of all or part of a piece of land known as **Machakos/Matuu/590 ("suit property")**. He averred that he had purchased this land from the beneficiaries of the late registered owner, Musomba Kioko ("**Musomba**").

2. He stated that, in accordance with the sale agreement dated 2/05/2002, he sold part of the suit property measuring **120ft by 100ft (“sold portion”)** for Kshs. 1,000,000. The defendant paid a deposit of Kshs. 450,000 and took possession of the sold portion, where a bus park had been established. Later, to settle the remaining balance, an additional Kshs. 200,000 was paid on 4/09/2002, leaving a balance of Kshs. 350,000. He believed that the breach of contract and frustration occurred on that significant day, 2/05/2002, and argues that, due to this breach, the defendant should be evicted.

3. He also mentioned that, despite the breach, in 2004, the defendant unlawfully entered an additional part of the suit property that rightly belonged to him, without permission. This encroachment involved a further area measuring **30ft by 100ft (“encroached portion”)** where the bus park was expanded. He pointed out that the bus park generated around Kshs. 800,000 each month for the defendant, which, according to him, had cost him approximately Ksh. 134,400,000/- in lost income from January 2004 until now. He pleaded with the court to grant him the following reliefs.

a. Special damages of Kshs. 134,400,000/= up to September 2018;

b. The defendant be evicted at its own costs;

c. The defendant be permanently restricted by itself or agents or servants or any other person who shall interfere with the parcel of land measuring approximately 120ft X 100ft and another measuring 30ft X 100ft comprising in parcel of land known as Machakos/Matuu/590;

d. General damages be assessed by the court for unlawful trespass or use of the plaintiff's land;

e. Mesne profits up to the time of eviction at Kshs. 800,000/= per month;

f. Costs of the suit;

***g. Interest of the suit (a) to (e) at 12% per annum;
and***

h. Any other relief the court deems fits and just to grant.

4. Upon service and notwithstanding the defendant's submission of a defence dated 14/10/2018 and an amended defence dated 8/11/2021, the defendant did not summon any witnesses to present evidence supporting the assertions therein; consequently, the averments in the defence remain unsubstantiated allegations.

Issues for determination

5. Hence, having considered the pleadings, the plaintiff's list of issues dated 17/12/2018, the plaintiff's unchallenged evidence and issues as outlined in the rival submissions that the parties filed, the following issue for determination arises: **whether the plaintiff proved his claim of trespass.**
6. Having outlined the issue to be decided, this court will now summarise the parties' evidence related to it as identified.

Hearing and evidence

7. This matter eventually proceeded to a hearing on 7/04/2025, during which the plaintiff testified as **PW1**. His evidence consisted of a written witness statement, oral testimony, and several documents that were marked and produced as **PExh. 1-13**. His testimony reaffirmed the allegations contained in the plaint, as previously summarised, and this court need not repeat them. To support these claims, he produced a sale agreement dated 18/08/1993, between himself and Ruth Ndinda Musomba, for land measuring 160 by 100 feet for plot no. 590 Matuu.
8. This agreement indicates that the purchase price was Kshs. 170,000/-, paid in instalments, with the final payment made on 4/06/1994. He also submitted another agreement dated 6/02/1998 between him and Jonathan Kieti Musomba for a parcel of land measuring 50 ft by 100 ft for Kshs. 60,000/-, and similar to the previous agreement, it was paid in instalments with the final balance settled on 6/02/1999. In this latter

agreement, the details of the land being sold, such as the plot or registration numbers, were not provided. The defence never contested these agreements.

9. He also submitted an agreement dated between himself and the Council on 2/05/2002. The main terms were that the purchase price was Kshs. 1,000,000/-, a deposit of Kshs. 450,000/- was paid, and the remaining Ksh. 550,000 was payable on or before 15/09/2002. It was further agreed that six months after full payment of the purchase price, the plaintiff would transfer the sold portion to the Council.
10. When questioned during cross-examination about this latter clause, he stated that, despite acquiring his title deed from Musomba's family during these proceedings, the clause was clear about when the transfer of the sold portion would take place. A reading of this agreement reveals that it was a stipulation of the agreement that the land was sold with vacant possession, and it emerged that the Council took possession upon paying the deposit.
11. He also produced an acknowledgement note revealing a further sum of Kshs. 200,000/- was paid to him on 4/09/2002 towards settling the balance of the purchase price. In this document, the parties recognised that a final balance of Kshs. 350,000/- remained outstanding, and agreed that it would be paid by the end of October 2002. The plaintiff produced a series of correspondence, and of particular interest is an

internal letter by the defendant dated 8/02/2016 confirming the plaintiff's assertions. Of particular interest, this letter further states that: -

"Sometimes in 2004 the Town Council wanted to extend the Bus Park and acquired 30 ft x 100 ft Plot from Mr. Ronald J. Kimeu and this piece of land was not paid at all."

12. Another pair of agreements was produced by the plaintiff, dated 16/07/2018, between him and Ruth Ndinda Musomba and Jonathan Kieti. These referred to their earlier agreements of 1993 and 1998, but specified that the land involved was the suit property. They also stated that he would be included as a beneficiary of Musomba's estate and that the transactions would be completed, including the issuance and execution of transfer instruments. In his evidence, he also produced a title deed for land parcel no. **Machakos Matuu/12244 ("plaintiff's registered land")**.

Submissions

13. After the hearing concluded, and at the behest of the parties, they argued their respective cases through well-argued written submissions received from the law firms of **Ms Kitindio Musembi & Co. Advocates**, representing the plaintiff, dated 25/04/2025, and from **Ms Janet Jackson & Susan LLP Advocates** for the defendant, dated 20/05/2025. Therefore, in its analysis and determination, the judgment will

carefully consider the arguments in the rival submissions, along with the relevant law and judicial precedents cited.

Analysis and determination

14. Before addressing the issue previously identified, it has become necessary to consider the preliminary matter of breach of contract as introduced in the parties' submissions. In the considered opinion of this court, this is impermissible, as it is well-established law that parties are bound by their pleadings and may not deviate therefrom; suffice it to say, no reliefs were ever sought based on the cause of action of breach of contract.
15. Furthermore, even if it is assumed, merely for the sake of argument-that the matter had been adequately addressed during the trial and made a matter for determination, such a cause of action for breach of contract, which arose on 31/10/2002, when the final balance of Ksh. 350,000/- was to be paid, is statute-barred by virtue of the applicable law, which is **Section 4 (1) (a)** of the **Limitation of Actions Act**. This proviso prevents a cause of action based on a contract from being brought after six years have passed since the cause of action arose.
16. We will now return to the substantive matter for determination, which concerns the cause of action of trespass; hence, it is necessary to look up the relevant law. Respecting this, **Article 40** of the **Constitution** recognises that every

person has the right to acquire and own property of any kind and in any location within Kenya. The protections and limitations related to such land rights are governed by **Sections 24, 25, and 26** of the **Land Registration Act**, which delineate land rights, privileges, appurtenances, liabilities, and interests. The other germane provisions of the law are contained in the **Land Act** and the **Trespass Act**, which specifically stipulate: -

Section 152A of the **Land Act 2016** states as follows: -

“A person shall not unlawfully occupy Private, Community or Public Land.”

Section 3 (1) of the **Trespass Act** defines trespass as: -

“any person who without unreasonable 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.”

17. As for the writings of eminent scholars, the text of **Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923**, defines trespass to land as follows: -

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

Page 927 of the same text discourses as to who may sue for trespass, and it states 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.”

18. In the book of **Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition, page 428**, trespass is discussed as follows:

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the

right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.”

19. In this case, the plaintiff’s claim was on trespass over the sold and encroached portions, with their sizes described in feet. According to him, they were contained within the suit property. Having made these assertions and notwithstanding his claim was unchallenged, the burden was on him, as required by **Section 107** of the **Evidence Act**, to prove his claim either by demonstrating that these properties were registered in his name or that he had taken possession of them before the defendant’s entry, as trespass claims are usually based on possession. He was also required to show that the defendant occupied the suit properties without his permission. So, what did he tender?

20. He produced a copy of the title deed of the plaintiff’s registered land; however, he failed to demonstrate to this court by way of tangible evidence the relationship between this particular parcel of land and the suit property either by way of a green card, certificate of official search, mutation form or otherwise. He also did not tender an official search of his registered land. His name is also not listed in the purported schedule for the distribution of Musomba’s estate that he produced before this court.

21. Additionally, the agreements for sale, which were executed respectively executed in 1993 and 1998, do not show that he was given possession thereof at the point of executing them or paying the final balance of the purchase price. The plaint also does not mention that he ever took possession of the sold and encroached portions when he purchased them from Musomba's beneficiaries. The agreement for sale between the parties merely states that it is sold with vacant possession, and he simply testified that he gave the defendant permission to enter the sold portion when it paid the deposit of the purchase price.
22. From a letter dated 8/04/2016 addressed to the defendant, it is clear that the plaintiff terminated such permission and issued a notice to vacate the sold and encroached portions, which are described as part of the suit property. However, he was still required to provide registration documents proving the existence of the suit property and that he was in possession. During his testimony, he failed to tender any evidence of his occupancy prior to the defendant's entry. Furthermore, in this court's humble opinion, the agreements of 16/07/2018 cannot fill the gaps in possession as suggested therein, since at the time of their signing, the defendant was allegedly already long in possession. It is also unclear whether these agreements were new agreements or amendments, or variations of the initial contracts of 1993 and 1998.

23. Significantly, the plaintiff never sought a relief over his registered land, whose title deed was issued to him on 22/05/2024, which was during these proceedings. To this court's mind, the plaintiff's claim was based on establishing that, at the time of the defendant's entry, he was in possession of the sold and encroached portions and/or was the registered owner of the suit property. Without this proof, the court finds that the plaintiff's evidence did not meet the required standards to prove his case. It is well established that costs follow the event, and since he was unsuccessful, costs are awarded to the defendant. Ultimately, this court issues the following final disposal orders:

a) The plaintiff's suit is hereby dismissed with costs to the defendant.

Judgment accordingly.

Delivered and Dated at Machakos this 8th day of December, 2025.

**HON. A. Y. KOROSS
JUDGE
8.12.2025**

**Judgment delivered virtually through Microsoft Teams
Video Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant.

Mr Muia for defendant.

Mr. Kitindio Musembi for plaintiff.

ORIGINAL