



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC PETITION NO 14 OF 2019**

**(Formerly Nairobi ELC 400 of 2016)**

**BETWEEN**

**MWAMBI INVESTMENT LIMITED .....**  
**PLAINTIFF**

**VERSUS**

**PHILIP MBITHI KAVISU .....1<sup>ST</sup>**  
**DEFENDANT**

**WILSON MBITHI MUNGUTI T/A KLEQUITE SERVICES.....2<sup>ND</sup>**  
**DEFENDANT**

**AND BY COUNTERCLAIM**

**PHILIP MBITHI KAVISU.....**  
**PLAINTIFF**

**VERSUS**

**MWAMBI INVESTMENT LIMITED .....**  
**DEFENDANT**

## **JUDGMENT**

### **Background of the case**

1. In a plaint filed on April 20, 2016, the plaintiff brought suit against the defendants and made several averments. It stated that at all relevant times, the plaintiff was and remains the registered owner of **LR 17847 (I. R. 64883) (“plaintiff’s land”)**, which covers 5 acres and is located in Athi River Township. The property was purchased from B.A.T. Kenya for Kshs. 1,000,000. After accepting an offer from Tyson’s Limited, the vendor’s sales agent, the purchase was made.
2. Furthermore, during a routine inspection of its land, it discovered that some building materials had been dumped on its property, prompting it to report the trespass to the Athi River police station on the acts of trespass by strangers. The strangers were summoned to the police station, and upon presenting themselves, the defendants produced forged title documents claiming they had also purchased the plaintiff’s land from B.A.T. Kenya. Additionally, it learnt that the stranger had attempted to sell the suit property to an innocent third party. Thus, it prayed for the following orders from the court: -

***a) The defendants, by themselves, their servants, employees, agents, workers, purchasers or any***

***person claiming under them, be restrained by permanent injunction from invading, trespassing, selling, transferring or in any other manner interfering with the plaintiff's property, known as LR. No. 17847 (I.R. 64883) situated within Athi River Township;***

***b) The 1<sup>st</sup> defendants be ordered to remove any construction or construction materials on the plaintiff's land; and***

***c) Costs of the suit.***

3. The 2nd defendant was not served with pleadings, and this court dismissed the claim against it. The 1st defendant filed an amended defence and counterclaim dated 21st March 2023, in which he made several averments and also put the plaintiff to strict proof. He stated that he is the registered owner of the plaintiff's land and has been in possession since 2016, and therefore was not a trespasser and admitted to having allowed contractors to place building materials on the plaintiff's land.
4. Additionally, in the counterclaim, he stated that he bought the plaintiff's land from British American Tobacco (K) Ltd while working at Camp General Engineering, which the vendor had contracted to subdivide the mother parcel on its behalf, with one of these subdivisions being the plaintiff's land. The purchase price was Kshs. 1,000,000, which he paid in full, and

the transfer was completed with the original title deed issued to him. Despite peaceful occupation, on 16th October 2016, his sons informed him that police and county officers entered the plaintiff's land, removed sand from it, and later, in November, carted away his 360 tonnes of crushed ballast.

5. To him, the plaintiff's land title documents were irregular and fraudulent, and he enumerated the following particulars: -

*a) The plaintiff, in collusion with the Chief Land Registrar and land officials, was issued with a title deed number L.R. No. 17847 (I.R. 64883) similar to that issued to the 1<sup>st</sup> defendant and which was already in the 1<sup>st</sup> defendant's possession.*

*b) The plaintiff, colluding with county officials at Mavoko sub-county, falsified public records by illegally and irregularly issuing rates, demand notices and receipts to the plaintiff when they knew that the 1st defendant had already made payments for the rates demanded.*

*c) The plaintiff, in collusion with the officials of the Survey of Kenya, obtained a deed plan as attached to the plaintiff's title deed plan, which refers to subdivision in the parcel as 17849, yet the subdivision done was in the original number 12198.*

*d) The plaintiff has occasioned the 1<sup>st</sup> defendant financial loss as he has been unable to use the plaintiff's land for five years.*

6. He pleaded and detailed the loss, stating that by not leasing the land to approximately 40 contractors, he had missed out on a rental income of Kshs. 10,000 per month, a sum of Kshs. 4,500,000 for the value of 1000 tonnes of gypsum, plus an additional Kshs. 1,960,000 for 700 tonnes of iron ore. He therefore sought the following reliefs from the court: -

***a) A declaration that the 1<sup>st</sup> defendant is the lawful owner of the plaintiff's land.***

***b) An order compelling the plaintiff and the 2<sup>nd</sup> defendant to surrender to the court any title deed in their possession with respect to the plaintiff's land, registered in their names or any other name, save for the 1<sup>st</sup> defendant's, for purposes of cancellation and revocation.***

***c) An order directing the 3<sup>rd</sup> defendant to cancel and revoke any other title save for the plaintiff, over the plaintiff's land.***

***d) An order directing the Chief Land Registrar, Nairobi, to cancel and revoke any other title save for the 1<sup>st</sup> defendant over the plaintiff's land.***

***e) Special damages of Kshs. 6,800,000.***

***f) General damages for loss of use of the land.***

***g) Costs and interest thereon.***

***h) Any other or further orders deemed necessary and just to grant in the circumstances.***

**Issues for determination**

7. Having considered the pleadings and the evidence presented by the parties during the hearing on the merits and issues as framed in the filed submissions, the following issues for determination arise: -

***a) Who, between the plaintiff and the 1st defendant, is the legitimate owner of LR 17847-(I.R. 64883)?***

***b) Who amongst the two is the trespasser?***

***c) Should the reliefs sought by the parties be granted?***

8. Having outlined the issues to be decided, this court will now summarise the parties' evidence related to these issues as identified. Moving forward, it is important to note that although the 1st defendant, in his counterclaim, sought orders against a 3rd defendant, nonetheless, the pleadings do not include such a party. Additionally, the 2nd defendant was not made a party to the counterclaim, and the reliefs he sought against it cannot be sustained.

## **Hearing and evidence**

9. The matter ultimately proceeded to a hearing on 29th May 2023, during which Agnes Nyaguthe Watatua (**PW1**), Vinecensia Juma (**DWI**), and the 1st defendant (**DW2**) testified. Their evidence was composed of witness statements (except for DW1, who was the land registrar and was summoned by the court), oral testimonies, and various documents produced. PW1's and DW2's testimonies reiterated their pleadings, so it is unnecessary to repeat them.
10. Additionally, PW1 testified that after obtaining injunctive orders from this court, she secured the plaintiff's land and erected a perimeter wall around it. When she inquired at the land office at Ardhi House, she discovered that the deed file was missing, but the plaintiff had since reconstructed it. She stated that although she did not have the sale agreement, she possessed other documents confirming that the plaintiff had purchased the land and that the owners of the building materials had carted away the materials found on the plaintiff's land. During cross-examination, she retold her evidence in chief and informed the court that she did not have the original receipts showing payment of the purchase price, or did she have the particulars of the OB No. from the police.
11. To support her case, the plaintiff produced several documents including the certificate of title of the plaintiff's land and showed the court the original copy (**Pex1**), the certificate of title the 1st or 2nd defendant left with the police

that is registered in the 2nd defendant's name (**"2nd defendant's land"**) and marked as **Pex2**, survey plan (**Pex3**), various correspondence between the plaintiff, its advocates and Tyson Limited, and a copy of a cheque towards deposit of the purchase price (**Pex4-6**), letter to the OCS dated 24th February 2016, deed of indemnity (**Pex11**), Kenya gazette notice (**Pex12**), and an updated copy of title (**Pex14**).

12. As for DW1, he explained the process of recording documents at the land's inland registry (I.R.) and informed the court that the records it held concerning the plaintiff's land had been tampered with, leading to their placement in the strong room. It also informed the court that the only records the Chief Land Registrar holds in custody are those related to the plaintiff's land.
13. He affirmed this by stating that he is responsible for registering instruments attending court, approving applications in the system, handling land transactions, conducting hearings for disputes between parties, signing title documents, among other duties.
14. He explained the process of detecting the registration status of a parcel of land by stating that the procedure involves entering a Land Registry (LR) number in its system to check for existing files on a property. Initially, documents are verified physically, followed by checks in the system for multiple files (if any).

15. If the physical file is in the strong room, it is retrieved from there, and copies are made of it. If two titles are found, it indicates there are two files for the same property, which should not occur. In such cases, an investigation is conducted, parties are summoned for a hearing, and a decision is made. If the decision is unsatisfactory, parties are advised to seek court intervention. To him, in the instant case, the records showed there was one registered owner who was the plaintiff.
16. When he received a summons to attend the hearing and give evidence regarding the plaintiff's land, he followed the process previously alluded to and established that the file had the habit of disappearing and reappearing, with the original file vanishing entirely. The person in charge of the strong room informed him of its disappearance. Upon reconstruction, the file was placed in the strong room's safe.
17. Its records indicate the reconstructed file was opened on 7/5/2019 after parties inquired about the disappearance of the file, and the land office did so after it recovered the deed file with the relevant transfer. In this reconstructed file, the documents he found were: a deed file cover, a copy of title, transfer dated 23/6/1995, a deed of indemnity dated 11/9/2008, an application for caveat of 1/7/2015, a gazette notice of 11/1/2019, a certificate of incorporation for the plaintiff, CR 12 dated 14/12/2018, a letter from P.C. Onduso &

Company dated 15/5/2019, and a booking form dated 2/7/2015. These were produced as exhibits.

18. As to the procedure for verifying a deed of indemnity (in this case, the applicant was the plaintiff), he stated that the indemnity is processed through the registry superintendent and head of the strongroom. They examine for any other existing files; if another file is found, the indemnity application will not be approved. But if another file is not found, they reconstruct the record when the client (in this case, the plaintiff) provides the original title, and an entry is made in the title.
19. When questioned regarding the procedures for conducting official searches at the land office, he testified that there are currently two types of searches. The first is through the *Ardhisasa* platform, which is performed at Nairobi registries and initiated by an advocate possessing an account with the platform. The second type involves manual searches carried out by registries across the country.
20. Therefore, he opined that **Dex6** and **Dex7**, which were official searches purportedly conducted for the years 2021 and 2022 and presented by the first defendant, did not originate from the land office. This is because these searches appeared to be generated from the e-Citizen platform, which was the official search system in use from 2002 until 2015 but was

discontinued due to issues of fraud. In other words, these searches are considered to be fraudulent.

21. He stated instances of fraud may include vanishing files and using the contents of files held by the Lands Office to produce false documents with the collusion of employees from the Ministry of Land. Additionally and as safeguards, a designated officer is responsible for data entry. Once the registrar signs a certificate of title, it is recorded in a black book, which has been the customary practice.
22. Furthermore, he also asserted that the 1st defendant's title documents contained discrepancies- the deed plan indicated the LR No as 12197/8, whereas the certificate of title showed the LR as 17847 **(Dex1)**. These documents were foreign as they were not recorded within their records. Additionally, he was unable to verify the authenticity of the rent clearance certificate submitted by the 1st defendant **(Dex 11)**.
23. Regarding the 1st defendant, he also testified that after purchasing the suit property from BAT for Kshs. 1,000,000, he paid an initial deposit of Kshs. 100,000, followed by the remaining balance of Kshs. 900,000. However, he did not possess his original certificate of title, as it had been used as collateral to secure a loan, and he produced a memorandum of understanding dated 4th September 2012, between himself and an individual named Mark Kimanthi Muendo, acting as the lender **(Dex3)**. He also testified that he had not provided

documentary evidence to substantiate his claim of special damages. He stated that he used to be an employee of the 2nd defendant.

### **Submissions**

24. After the hearing concluded, and at the request of the parties, the parties argued their respective cases through written submissions that were well received from the law firms of **Mss P.C Onduso & Co Advocates** representing the plaintiff, dated 25/04/2025, and from **Kalwa & Co. Advocates** for the 1<sup>st</sup> defendant, dated 10/07/2025. Therefore, in its analysis and determination, the judgment will carefully consider the arguments presented in the rival submissions, along with the relevant law and judicial precedents cited. The issues previously identified will be addressed concomitantly.

### **Analysis and determination**

25. As concerns the first limb, the pertinent legal framework for protection and impeachment of title documents over land is found in our **Article 40 (1) and (6)** of the **Constitution**. These provisions restrict legal protection to property that has been lawfully acquired and owned. According to these **Sub-Articles**, every person has the right, whether individually or in association with others, to acquire and own property within Kenya. Statutorily, **Sections 24** and **25** of the **Land**

**Registration Act** acknowledge the registered owner as the absolute owner of the land and provides protection under **Section 24**. However, a title document may be impeached on various grounds outlined in **Section 26** of the Act, including fraud.

26. It is well-established law that fraudulent, illegal, and irregular conduct must be specifically pleaded as required by **Order 2 Rule 4** of the **Civil Procedure Rules** and proved with a standard of proof higher than the balance of probabilities but less than proof beyond a reasonable doubt. In the instant case, the 1<sup>st</sup> defendant's claim met the 1<sup>st</sup> threshold by pleading and particularising fraud.
27. In respect of the 2<sup>nd</sup> threshold of proof, the evidential burden is placed upon the person alleging to prove his claim as provided by **Sections 107** and **109** of the **Evidence Act**. Furthermore, relying solely on inference from the facts to establish fraud or irregularity is not allowed. In the case of **Koinange and 13 others v Koinange [1986] KLR 23**, which has been cited in several court decisions which this court associates with, the court reaffirmed the fundamental principle of the law of evidence that he who alleges must prove. In the case of **Ratilal Gordhanbhai Patel v Lalji Makanji [1957] EA 314 and another [1979] KLR**, it was established that fraud primarily concerns an individual's state of mind and intentions, rather than the outcomes of their actions.

28. Additionally, fraud is defined by **Black's Law Dictionary, 11th Edn, at p. 802**, as a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Having particularised fraud as earlier emphasised in a past paragraph, the onus was on the 1<sup>st</sup> defendant to substantiate it on a standard of proof exceeding the balance of probabilities but falling short of proof beyond a reasonable doubt. **See the Court of Appeal decision in Vijay Morjaria v Nansingh Madhusingh Darbar & Hulashiba Nansingh Darbar (Civil Appeal 106 of 2000) [2000] KECA 223 (KLR) (Civ) 1 December 2000 (Judgment).**

29. The respective parties submitted two certificates of title as evidence. This court recognises that it is a regrettable reality in this country that multiple titles often exist for the same parcels of land. In such cases, the court must determine the legitimate owner of the land parcels.

30. Consequently, and in such instances, the court frequently requests the land office to produce its records as evidence. For sure, the legislation does not envisage the issuance of two titles, and technically, it should not happen, and this court is privy that the land office is in the process of digitising its processes to seal loopholes that fraudsters have exploited.

31. In this case, the 1st defendant presented a title document. However, his own witness, whom he called to testify and who was the custodian of such records, dissociated himself from the document and punctured holes in the various documents, as detailed in his testimony, which this court has summarised above. The testimony of DW1 was consistent and unchallenged, and the witness appeared to be disillusioned with acts of fraudulent collusion between its officers and members of the public, including the 1st defendant.
32. According to him, individuals engaged in fraudulent activities who targeted the plaintiff's land had accessed its records and stolen documents. This situation necessitated the reconstruction of the land records, a process elaborately described as lengthy, involving the review of the blackbook, obtaining the deed file along with the relevant transfer documentation (which, in this instance, evidenced the plaintiff's payment of Ksh. 1,000,000 to the vendor), and acquiring the original certificate of title from the owner to authenticate the title. Once these steps are completed and verified, the subsequent procedures of gazettelement and registration of indemnity are initiated. In this case, DW1 produced these documents.
33. Respecting the official searches, DW1 dismissed them, and his evidence was not contested. To this court, the 1st defendant did not displace the plaintiff's title documents to the land. Therefore, this court is convinced, based on the

testimony of PW1 as corroborated by DW1 and supported by documentary evidence, that the plaintiff holds a valid title deed for the land. To this court, their evidence was consistent, unchallenged, and credible.

34. To this court, the 1st defendant made a misguided attempt at fabricating documents, unaware that the lands office possesses mechanisms for authenticating its records. The outcome could have been different if the plaintiff had not taken proactive measures to safeguard its land. Based on the adduced evidence, the court determines that the 1st defendant is a fraudulent individual who unlawfully entered the plaintiff's land using forged documents without proper authority or permission. Additionally, the court finds that the 1st defendant is a trespasser.

35. In conclusion, based on the reasons and findings articulated hereinabove, this court determines that the plaintiff has demonstrated its case to the required standard of proof, whereas that of the 1<sup>st</sup> defendant has not proved its counterclaim to the required standard.

36. It is well-established that trespass is actionable offence per se, without the necessity of demonstrating actual damage. Considering the duration of the trespass, the size of the affected property, the location, and the nature of the trespass, the court hereby awards the plaintiff Kshs 1,500,000/- as general damages. As costs follow the event, the plaintiff

shall be entitled to costs. Consequently, the following final disposal orders are hereby issued: -

***a) The 1st defendant, by himself, his servants, employees, agents, workers, purchasers, or any person claiming under him, be restrained by a permanent injunction from invading, trespassing, selling, transferring, or in any other manner interfering with the plaintiff's property, known as LR. No. 17847 (I.R. 64883), situated within Athi River Township.***

***b) An order is hereby made that the 1st defendant, by himself, his servants and/or agents or any other parties claiming under or through him, illegally on LR. No. 17847 (I.R. 64883) situated within Athi River Township, do vacate it and, at their own cost, remove any construction or construction materials therein within 90 days hereof and give the plaintiff vacant possession, and in default, the plaintiff shall forcefully evict them together with their servants or agents.***

***c) The plaintiff is awarded general damages of Kshs. 1,500,000/-, which shall be borne by the 1st defendant.***

***d) The 1st defendant's counterclaim is dismissed with costs awarded to the plaintiff.***

***e) The plaintiff shall have costs of its suit, which the 1st defendant shall bear.***

Judgment accordingly.

**Delivered and Dated at Machakos this 16<sup>th</sup> day of December, 2025.**

**HON. A. Y. KOROSS  
JUDGE  
16.12.2025**

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

In the presence of;

Ms Kanja Court Assistant

Mr. Onindo holding brief for Mr. Onduso for plaintiff.

N/A for defendants.

ORIGINAL