



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT**

**NAIROBI**

**ELC LC NO. E159 OF 2023**

**JULIUS WAIGUCHU MWANGI (suing through JOSEPH NJOROGE MURAGE)**  
..... **PLAINTIFF**

**=VERSUS=**

**DOROTHY NJAMBI WAIGUCHU** .....  
**DEFENDANT**

**JUDGMENT**

1. By an amended Complaint dated 13<sup>th</sup> September 2024, the Plaintiff seeks the following orders:

- a) An order of permanent injunction restraining the Defendants either by themselves, their authorized agents, servants and/or any other person whomsoever acting under their instructions from interfering with the Plaintiff's access to, use of and quiet possession of the suit property known as***

**L.R. No. 1160/346 currently referred to as L.R. Nairobi/Block 148/32 with the developments made thereon.**

- b) An order of permanent injunction restraining the Defendants either by themselves, their authorized agents, servants and/or any other person whomsoever acting under their instructions from entering upon, wasting, remaining on or continuing in occupation of and/or otherwise dealing with the suit property in any way whatsoever.**
- c) A declaration that the Plaintiff is the rightful owner and entitled to exclusive, quiet, and peaceful enjoyment of the suit property.**
- d) General damages for trespass and interference with the Plaintiff's rights resulting in degradation and neglect of the suit property.**
- e) An order to the Defendant to give the Plaintiff immediate vacant possession of the suit property.**
- f) Costs of the suit.**
- g) Any other relief the Court may deem fit to grant.**

**2.** The Defendant filed witness statements but failed to file a defence. The record shows that the Defendant filed grounds of opposition dated 19<sup>th</sup> November 2023

and a replying affidavit in opposition to the application dated 6<sup>th</sup> November 2023.

### **THE PLAINTIFF'S CASE**

3. The Plaintiff Joseph Njoroge Murage testified as PW1 and called one witness in support of his case. He adopted his amended witness statement dated 13<sup>th</sup> September 2024 as his evidence-in-chief. He also produced the documents in his list in support of his evidence.
4. PW1 testified that the Plaintiff, who is his uncle, donated to him a Power of Attorney dated 12<sup>th</sup> September 2023 authorizing him to act on his behalf in all matters related to this suit. He further testified that the Plaintiff and African Variety Limited jointly own the suit property. He testified that the Defendant is neither a shareholder nor the owner of the suit property.
5. He stated that the owners of the suit property built a two-story house intended for an elderly home, but it was not finished, although it is well-maintained. He also mentioned that the Plaintiff often gave Mr. Muruku money for the construction and upkeep of the building.

He asserted that he managed the building on behalf of the property owners while they were abroad.

6. He testified that after Mr. Muruku's death, the Defendant moved into the suit property and denied him access. He further testified that when the Defendant travelled to the U.S., she left the property unattended, which caused its deterioration because she refused to have it maintained with the funds sent by the Plaintiff.
7. On cross-examination by Mr Kenyariri, he testified that the Plaintiff owns 2/5 of the suit property, while African Variety Limited owns 3/5. He further testified that Mr Muruku owns 99% of the shares in African Variety Limited. He stated that the certificate of Confirmation of Grant shows that African Variety Limited was listed as the owner of the suit property.
8. He explained that the funds sent by the Plaintiff were meant for the maintenance and construction of the suit property. He also clarified that there was an agreement between Jimwa Construction, Mr. Muruku, and the Plaintiff, although the construction company's designs were not presented in court. Concluding his testimony,

he stated that the Plaintiff cannot access his portion of the suit property because the Defendant changed the locks.

9. PW2 Gilbert Muruku Waiguchu adopted his witness statement as his evidence-in-chief. He told the court that the Plaintiff is his cousin, while Mr. Muruku was his father. He stated that Mr. Muruku repeatedly told him that he and the Plaintiff were the owners of the suit property, which consists of a 53-room building. He further testified that Mr. Muruku left a will regarding the business and that the Plaintiff should complete the maintenance work.

10. On cross-examination by Mr. Kenyariri, he testified that he knew his father had invested in the suit property with his cousin, but he did not have a title deed to prove the same. He further stated that he did not know whether the construction on the suit property had been completed.

### **THE DEFENDANT'S CASE**

11. The Defendant Dorothy Njambi Waiguchu testified as DW1 and called one witness in support of her defence.

She adopted her witness statement filed in court on 23<sup>rd</sup> September 2024 as her evidence in chief. She also produced the documents in her list dated 26<sup>th</sup> September 2024 in support of her evidence.

12. DW1 testified that African Variety Limited owns 3/5 of the suit property (1.5 acres) while the Plaintiff owns 2/5, equivalent to one acre. She further testified that her late husband (Mr. Muruku) held 99% of the shares in African Variety Limited and that the Plaintiff was not a shareholder.
13. She explained that one acre was hived from the suit property by the Nairobi County Government was not a part of the deceased's estate. She also explained that the commercial construction on the suit property had stalled since her husband's death.
14. She went on to state that the Plaintiff lives in the U.S. and has never set foot on the suit property, while she has been occupying it since it was purchased. In conclusion, she emphasized that she is not a stranger to the suit property, as Mr. Muruku owned 3/5, and that she is a co-administrator of his estate.

15. On cross-examination by Ms Nyokabi, she testified that her late husband, who was the Plaintiff's uncle, built an old people's home on 1.5 acres of the suit property without the Plaintiff's input. She maintained that the Plaintiff's parcel and African Variety Limited's parcel are distinct. She acknowledged that she does not know when the County Government carried out the subdivision on the suit property.
16. She stated that she does not know whether the Plaintiff has access to the suit property, but acknowledged that there is only one entrance. Concluding her testimony, she stated that the Plaintiff should build his own gate to access his part of the suit property.
17. DW2 Esther Wanjiru Wachira adopted her witness statement as her evidence in chief. She testified that Lisa Mugure Waiguchu, Mr. Muruku's daughter, granted her a Power of Attorney to represent her in this matter.
18. She testified that Mr. Muruku and the Defendant constructed the building on 1.5 acres of the suit property, while the Plaintiff owns one acre of the suit

property. She testified that the Defendant left her job in the U.S to oversee the construction on the suit property, which was funded by Mr. Muruku using his retirement savings. She asserted that Mr. Muruku's wish was to sell the suit property and divide the proceeds among himself, the Defendant, and Lisa Mugure.

19. On cross-examination by Ms Nyokabi, she testified that the deceased's wishes were documented in emails sent to Lisa. She further stated that a surveyor had demarcated the two parcels, although no beacons had been installed. In conclusion, she stated that the Plaintiff should create his own entrance to access his part of the suit property.

After the close of the hearing, the parties agreed to file and exchange written submissions.

### **THE PLAINTIFF'S SUBMISSIONS**

20. The Plaintiff filed his submissions dated 9<sup>th</sup> June 2025.
21. On behalf of the Plaintiff, Counsel outlined the following issues for the court's determination:-

*a) Does the Defendant have a right to interfere with the Plaintiff's right as a registered proprietor?*

*b) Did the Defendant have the right to trespass on the property?*

*c) Does the Plaintiff have the right to seek damages?*

**22.** Regarding the first issue, Counsel relied on the certificate of title, the official search certificate, and witness statements to submit that the Plaintiff is a co-owner of the suit property along with African Variety Limited. To support this claim, reliance was placed on the case of **Ochako Obinchu v Zachary Oyoti Nyamongo [2018] KEELC 3418 (KLR).**

23. Counsel further submitted that the Plaintiff and African Variety Limited, as the registered owners, have exclusive rights to possess and use the suit property. It was submitted that the Plaintiff's title supersedes all other documents produced by the Defendant.

24. Counsel further submitted that the Defendant's unlawful occupation of the suit property, coupled with

her refusal to grant the Plaintiff access, violates his right to property under Article 40 of the Constitution.

25. Regarding the second issue, Counsel submitted that the Defendant is a trespasser on the suit property because she is neither the owner nor a director of African Variety Limited. Counsel also pointed out that the Defendant filed a succession cause after this suit was filed and that the proceedings had not been concluded because the grant was subjected to an objection. Counsel contended that the Defendant wilfully trespassed on the suit property and prevented the Plaintiff's agents from entering for maintenance purposes.

26. Regarding the third issue, Counsel submitted that the Plaintiff had proved that the Defendant had trespassed on the suit property and was therefore entitled to an award of damages.

### **THE DEFENDANT'S SUBMISSIONS**

27. The Defendant filed her submissions dated 2<sup>nd</sup> June 2025. On behalf of the Defendant, Counsel submitted that the Plaintiff holds a 2/5 interest in the suit

property, while the Defendant possesses a 3/5 interest. Counsel further submitted that based on the evidence on record, the Plaintiff requires a right of way to access his portion of the suit property, which he can create for himself. Counsel further submitted that the Plaintiff has never entered the suit property, has no structures thereon, and that his representatives lacked an understanding of its nature. Additionally, Counsel asserted that the Defendant is not a trespasser, as she is the widow of the majority shareholder in African Variety Limited, which owns a 3/5 interest in the suit property.

### **ANALYSIS AND DETERMINATION**

28. Having considered the pleadings, the evidence on record, and the submissions by the parties, the following issues arise for determination.

*a) Whether the rightful owner of the suit property?*

*b) Whether the Plaintiff is entitled to the orders sought*

**29. WHETHER THE PLAINTIFF IS THE RIGHTFUL OWNER OF THE SUIT PROPERTY**

30. The Plaintiff seeks a declaration that he is the rightful owner of the suit property and is therefore entitled to exclusive possession. Although the Defendant did not file a defence, the Plaintiff has a duty to prove her case beyond a reasonable doubt.

31. The Plaintiff produced a title to the suit property showing that he owns 2/5 of the suit property, while Africa Variety Limited owns 3/5. It is therefore clear that the Plaintiff is the rightful owner of 2/5 of the suit property and not the sole owner as alleged. Based on the foregoing, I find that the Plaintiff is the rightful owner of 2/5 portion of the suit property.

**WHETHER THE PLAINTIFF IS ENTITLED TO THE ORDERS SOUGHT IN THE PLAINT**

32. The Plaintiff is seeking a permanent injunction to prevent the Defendant from trespassing on the suit property. The Plaintiff alleged that the Defendant trespassed on the suit property because she is neither an owner nor a director of African Variety Limited. The

court is called upon to determine whether the Defendant trespassed onto the suit property.

33. **Black's Law Dictionary, 10<sup>th</sup> Edition**, defines trespass to land as follows;

***“A person's unlawful entry on another's land that is visibly enclosed.”***

34. In the case of **Municipal Council of Eldoret Vs Titus Gatitu Njau (2020) eKLR**, the Court of Appeal cited the case of **M'Mukanya Vs M'Mbijiwe (1984) KLR 761**, where the ingredients of the tort of trespass were stated as follows;

***“Trespass is a violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land, which is different from ownership, see Thomson Vs Ward (1953) 2 QB 153.”***

35. To establish trespass, the Plaintiff must prove that he was either lawfully in possession of the property or was the owner and that the Defendant entered the property without any justifiable cause.

36. In the case of **Gitwany Investments Limited vs Tajmal Limited & 3 Others [2006] eKLR**, the Court held that title to land carries with it legal possession. This means that even if one does not have actual possession of land, so long as he has a title to the land, that is deemed as possession for the purposes of trespass.
37. The title for the suit property indicates that African Variety Limited owns 3/5 of the suit property, while the Plaintiff owns 2/5.
38. For the Court to establish whether trespass has been proven, it must have definite evidence of the boundaries' location. Such evidence is lacking in this case. The Plaintiff did not demonstrate that the boundaries separated the two portions. The Defendant claimed that the County Government of Nairobi had excised one acre from the suit property, which was not part of the deceased's estate. However, she admitted during cross-examination that she did not know when the subdivision took place. DW2 also acknowledged during cross-examination that there were no beacons

on the suit property. Based on the evidence on record, it is evident that the suit property has not been properly demarcated. There being no defined boundary between the two portions of land, I find that the Plaintiff has not shown that the Defendant trespassed on his one-acre portion or that the building is constructed on his part of the property. From the foregoing, I find that the Plaintiff has not proved to the satisfaction of this court that the Defendant trespassed on the suit property.

39. Based on the foregoing, this court finds and holds that the Plaintiff has failed to establish a prima facie case to warrant the grant of a permanent injunction.

40. The Plaintiff is seeking an order for vacant possession of the suit property. The Court cannot address the issue of vacant possession until the boundaries are clearly defined. The title shows that the parties intended to be tenants in common, not joint tenants. In the absence of evidence of boundary determination, an order for vacant possession would be incapable of enforcement. Therefore, the provisions of Section 94 of the Land

Registration Act regarding the subdivision of land held by tenants in common are applicable for their use.

41. In view of the foregoing, I find that the Plaintiff has not proved his case on a balance of probabilities as required by the law. The upshot of the foregoing is that the Plaintiff's suit is hereby dismissed.

42. Each party to bear its own costs.

**RULING DATED, SIGNED, AND DELIVERED VIA  
MICROSOFT TEAMS THIS 5<sup>TH</sup> DAY of DECEMBER,  
2025.**

.....  
**HON. T. MURIGI**  
**JUDGE**

**IN THE PRESENCE OF**

Ms Kiama holding brief for Ms Nyokabi for the Plaintiff

Kenyariri for the Defendant

Ahmed- Court assistant