

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ELCC NO 53 OF 2019**

**ADAM ISAAK WAKO** .....  
**PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF TANA RIVER** .....  
**DEFENDANT**

**RULING**

**THE CLAIM**

1. In the plaint dated 10<sup>th</sup> July 2019 the Plaintiff sought the following orders:
  - a. **A declaration that the defendant is a trespasser on the suit land which is all that piece of land situated in Tana River County being LR Number 23361 - Kipini measuring 24.30 hectares or thereabouts;**
  - b. **A mandatory injunction to order the defendant forthwith to pull down and or remove the structures from the plaintiff's land from all that piece of land situated in Tana River County being LR Number 23361 - Kipini measuring 24.30 hectares or thereabouts;**
  - c. **An eviction order directing the plaintiff to evict the defendant from all that piece of land situated Tana River County being LR Number 23361 Kipini measuring 24.0 hectares or thereabouts and pull down the defendant's constructions structures standing thereon;**
  - d. **An order directing Officer Commanding Station Kipini Police Station to supervise and provide security during the eviction;**
  - e. **Costs and interest;**
  - f. **Any other relief the court may deem fit.**
  
2. The grounds on which the claim has been brought is that at all material times to the suit the plaintiff is the legal registered owner of **LR Number 23361 Kipini** measuring **24.0** hectares or thereabouts while the defendant is a trespasser on the same piece of land. The plaintiff has obtained a certificate of title to the land. However, the defendant has

entered the suit land and is wrongly in occupation and use of the said land and has proceeded to erect illegal structures thereon.

3. The defendant though it was represented by counsel throughout the suit proceedings never file any defense in the matter. It only filed submissions on 8<sup>th</sup> July 2025.
4. Hearing took place on 27<sup>th</sup> February 2025 when **PW1**, the plaintiff, testified orally and adopted his witness statement dated 10<sup>th</sup> July 2019 as his evidence-in-chief. He claimed at the land has been his since **1995**; that he has carried on some activities thereon during that period of occupation; that in **2019** the defendant entered the suit land and excavated a foundation thereon whereupon the plaintiff reported to the police and to the DO (presumably the current day equivalent of an Assistant County Commissioner under the current national government administrative setup) who recommended that he should sue the defendant. During the hearing the plaintiff also produced **Exhibits 1-3**. He denied having consented to the defendant's entry and occupation of the land. He was not paid for any entry and occupation by the defendant. The land is **60** acres. The land was allocated to him by the government. The defendant has, allegedly by use of force, built a building to completion on the suit land. Upon being a cross-examined by Mr Lugu for the defendant, he admitted that he has not brought in evidence to show that the County Government is building on the suit land.

## **SUBMISSIONS**

5. In his submissions on behalf of the plaintiff, his counsel stated that the ownership of the subject matter is not in doubt and that the plaintiffs had exhibited documents which showed that there was a huge construction going on the suit land. He submitted that the defendant had failed to follow the proper channel to acquire the suit land for its purposes if it so wished, and that its dealings with the land is against the provisions of **Article 40** of the Constitution of Kenya.
6. Counsel for the defendant in his submissions alluded to the filing of a statement of defense dated 26<sup>th</sup> May 2021. However, as I stated hereinbefore the CTS here in above does not show any filing of defence in the matter and the present file does not contain any physical copy of the alleged defence.
7. Citing **sections 107, 108 and 109** of the Evidence Act, the defendant stated that the plaintiff has failed to demonstrate any connection between the alleged construction and the defendant. Counsel for the defendant also stated that to be able to establish the tort of trespass, the plaintiff had to establish ownership of the suit property.
8. This court has considered the evidence presented by the plaintiff in support of his case. As the defendant states, it is correct courts give orders on the basis of evidence presented to support the cases before them; also, that in every litigation before court, the evidence adduced has to support the statements of fact made in a pleading if the case framed in that pleading is to succeed.

9. The law is that whoever alleges proves. Regarding the burden of proof, Sections 107, 108 and 109 of the Evidence Act provide as follows:

**“107. Burden of proof.**

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**108. Incidence of burden.**

**The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

**109. Proof of particular fact.**

**The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

10. The plaintiff ought to establish by evidence that the claims in the plaint have a probability of truth in them and the defendant is expected to call evidence to rebut or mitigate the claims made. If there is no evidence at all to support the statements in a plaint, the claim must fail even if the defendant has filed no defence and that is evident in the well-known case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** where the court stated as follows:

**“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”**

11. In the **Daniel Toroitich Arap Moi** case (supra) the Court of Appeal also held as follows:

**“Whether or not the appellant had not denied the facts by affidavit or defence, when the 1<sup>st</sup> respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1st respondent that:**

**“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”**

12. In **Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] KECA 166 (KLR)** the court held as follows:

**“We have carefully considered the judgement of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”**

13. The plaintiff in the present case relied on his oral evidence and on 3 documents, that is, a copy of a certificate of title photographs of the suit land and a copy of the demand notice. His oral evidence is uncorroborated. Further, the documents he has produced as evidence do

not connect the defendant to the construction that is going on the suit land.

14. The plaintiff has not therefore proved his case against the defendant to the required standard and therefore the present suit is hereby dismissed with costs.

**Dated, signed and delivered at Malindi on this 09<sup>th</sup> day of December 2025.**

A rectangular box containing a handwritten signature in blue ink, which appears to read "Mwangi Njoroge".

**MWANGI NJOROGE  
JUDGE, ELC, MALINDI**