

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC NO. 39 OF 2022**

**PETER NJUGUNA----- KIBE**  
**PLAINTIFF**

**VERSUS**

**JUDITH NELIMA NDEGWA-----**  
**DEFENDANT**

**AND**

**THE TRUSTEES,  
ANGLICAN CHURCH OF KENYA-----**  
**INTERESTED PARTY**

**JUDGMENT**

- 1. The plaintiff approached this court through a plaint dated **19/12/2022** and amended on **12/11/2024**. He seeks:
  - (a) Declaration that he is the lawful owner of Title No. Waitaluk/Mabonde Block 2/Machungwa/602, hereinafter, the suit property.**
  - (b) Permanent injunction restraining the defendant from further encroachment and or trespass onto the suit property.**
  - (c) Eviction of the defendant.**
  - (d) Damages for trespass.****

2. The plaintiff avers that on **7/12/2015**, he bought Title No. **Waitaluk/Mabonde Block 2/Machungwa/448** from John Wainaina Ndegwa, which was transferred to him. The plaintiff avers that after taking possession of the land, he subsequently subdivided it into two portions, resulting in title Nos. **Waitaluk/Mabonde Block 2/Machungwa/602 and 603.**
3. The plaintiff avers that he took possession of the title No. **Waitaluk/Mabonde Block 2/Machungwa/602**, while title No. **Waitaluk/Mabonde Block 2/Machungwa/603** was transferred to the Registered Trustees, Anglican Church of Kenya, Machungwa, the interested party herein.
4. Further, the plaintiff avers that at the time of purchasing the land in **December 2015**, he had been informed by the vendor that the defendant, a lessee on the land, had been notified to vacate the land due to the impending transfer of ownership. The plaintiff avers that after securing proprietorship of the land, he has on diverse occasions demanded that the defendant cease further encroachment by vacating the land, but has remained adamant, hence this suit.

5. The defendant opposed the suit through an amended defence and counterclaim dated **12/11/2024**. The defendant denies the contents of the amended plaint. On the contrary, the defendant avers that title No. **Waitaluk/Mabonde Block 2/Machungwa/448** alleged subdivided into **Waitaluk/Mabonde Block 2/Machungwa/602** and **603**, owned by the plaintiff, is her matrimonial property, which she never consented to being sold and transferred to the plaintiff.
6. The defendant denies that the plaintiff ever took vacant possession of the suit property as alleged or at all, since she has lived on the suit property for over **30 years** and has never met or seen the plaintiff on the land.
7. The defendant avers that if there is any doubt of ownership of the suit property for the initial parcel or its resultant subdivision, possession by the plaintiff, then the said documents must have been obtained fraudulently and or illegally without her knowledge or consent.
8. The defendant avers that the suit land is her matrimonial property and home where she has lived for over **30 years**, and that she was never a lessee of the same as alleged by the plaintiff.

- 9.** Further, the defendant avers that the plaintiff has no legitimate proprietary rights over the suit property as alleged and that she has never encroached onto the alleged land to be liable for eviction.
- 10.** By way of a counterclaim, the defendant, as the plaintiff, sued the plaintiff as the defendant in the counterclaim and the interested party. The defendant averred that in **1974**, she got married to one John Ndegwa Wainaina (deceased), under customary law as the second wife. The defendant avers that in the course of their marriage, the couple purchased title No. **Waitaluk/Mabonde Block 2/Machungwa/59** in **1988** or thereabout, measuring **20 acres**, and in **1989**, she moved into the land.
- 11.** The defendant avers that before they could finish paying for the land, she was shocked to find that her late husband had already disposed of **2.5 acres** of the land without her knowledge, involvement, or consent, leading to an unending family feud.
- 12.** The defendant avers that in **2000**, things got worse when the late husband denied her and her children access to cultivate the land and embarked on a mission to evict her from the land. The defendant avers that it took the intervention of the court to order the subdivision of the suit title to give her and

her children **7.5 acres** in equal share, and the remaining **10 acres** was registered as **Waitaluk/Mabonde Block 2/Machungwa/448**, now subdivided into the suit property herein.

- 13.** The defendant avers that the deceased husband, in his quest to evict them from the said **10 acres**, took the intervention of a human rights body to arbitrate until a consent was reached between her and the deceased.
- 14.** The defendant avers that during the pendency of the dispute between her and her late husband, the deceased secretly colluded with his first wife, Rose Njeri Njuguna, and the plaintiff to fraudulently dispose of her matrimonial home, which scheme culminated in the fraudulent plan to evict her from the said home.
- 15.** The particulars of fraud as pleaded included entering into a sale agreement over land acquired during the subsistence of marriage, entering into the transaction during the pendency of a dispute, purporting to obtain a spousal consent from her co-wife only to dispose of the land, and subdividing the land without her consent or knowledge.
- 16.** The defendant in the counterclaim prays for:

- (a) **Declaration that Title No. Waitaluk/Mabonde Block 2/Machungwa/448 was matrimonial property, and the purported sale and transfer to the plaintiff was without her spousal consent.**
- (b) **Cancellation of Title No. Waitaluk/Mabonde Block 2/Machungwa/602 and 603 to revert to Title No. Waitaluk/Mabonde Block 2/Machungwa/448 to be registered under her name.**
- (c) **Eviction of the interested party, its agents, and or members from the suit property.**
- (d) **Permanent injunction.**

**17.** At the hearing, **Peter Kibe Njuguna** testified as **PW1**. He relied on a witness statement dated **19/12/2022** as his evidence-in-chief. PW1 told the court that on **17/12/2015**, he signed a sale agreement with the late John Wainaina Ndegwa, the owner of the title No. **Waitaluk/Mabonde Block 2/Machungwa/448** to purchase the land, which he later transferred to him, after his wife, Rose Njeri Njuguna, gave a spousal consent through an affidavit.

**18.** PW1 said that in the course of the transaction, he learned that the defendant, who was a lessee on the land, had been given a notice to vacate the land through the land administration. PW1 said that he indulged her due to some impending crop harvest of

sugarcane, but has now taken advantage of his long spell away from Kitale to remain on the land.

- 19.** PW1 said that he later subdivided the land into parcels Nos. **Waitaluk/Mabonde Block 2/Machungwa/602** and **603**, and transferred the latter to the interested party. PW1 produced the sale agreement dated **7/12/2017**, copy of land transfer form dated **10/12/2015**, copy of affidavit of marriage dated **10/12/2015**, copy of spousal consent dated **10/12/2015**, copy of title for parcel No. **448**, issued on **10/12/2015**, copy of titles for parcel **No. 602** and **603** issued on **13/10/2021**, letters dated **6/7/2022**, **13/7/2022**, and **16/9/2022** and a copy for donation agreement dated **27/3/2018** as **P. Exhibits No. 1, 2, 3, 4, 5, 6, 7, 8(a), (b), (c),** and **(d)**, respectively.
- 20.** In cross-examination, PW1 told the court that he has never tilled the land since **2015**, which he bought from his late brother-in-law. PW1 admitted that he obtained a title deed three days after the sale agreement. PW1 said that since **2015**, he has been unable to obtain vacant possession because the defendant has been hostile to him.
- 21.** PW1 admitted that at the time of purchase, the ACK Church premises were still on the land. PW1 said

that after purchasing the land, he established that the defendant was his immediate neighbour as well as the church.

- 22.** PW1 said that he made a report to the Bikeke Police Station after someone chased him from the land, and he had left his brother-in-law to deal with the trespassers as per **P. Exhibit No. 8(b)** dated **6/7/2022**.
- 23.** Again, PW1 said that the defendant had a house or home separated by a fence away from the suit property. PW1 said that the land that he bought is planted with sugarcane; otherwise, it was vacant, save for the sugarcane, when he bought it in **2015**.
- 24.** **Judith Nelima Ndegwa** testified as **DW1**. She relied on a witness statement dated **5/7/2023** as her evidence-in-chief. Her testimony was that she was the wife of the late John Wainaina Ndegwa since **1974**, when she had only **2** acres of land at Matisi, given to her by her parents.
- 25.** DW1 said that at the request of the deceased, she sold the **2** acres and bought the suit property between **1987** and **1988**, as title No. **Waitaluk/Mabonde Block 2/Machungwa/59** measuring **20 acres**. DW1 said that the deceased sold **2.5** acres of the land, leading to a family

dispute. DW1 said that she moved into the land in **1989** and established a home, only for the deceased to purport to evict her and her **3** children from the land due to her Luhya tribe.

- 26.** Further, DW1 said that in **2001**, she sought help from a human rights help group, a human rights group leading to a suit in **Eldoret Magistrates Court Case No. 601 of 2001**, a mediation settlement, and a court order on **12/8/2003**. DW1 said that between **2003** and **2006**, the deceased refused to subdivide the land to defeat the court order, leading to another order dated **3/2/2006**.
- 27.** DW1 said that after her children were settled on the **7.5 acres**, she was to remain in charge and use of the **10** acres known as title No. **Waitaluk/Mabonde Block 2/Machungwa/448**. DW1 said that in **2006**, she filed **Kitale High Court (OS)** to share the land with the deceased, which file disappeared.
- 28.** DW1 said that in **2015**, the deceased wrote to her to vacate the land. DW1 said that she later filed **Divorce Cause No. 2 of 2015** in Kitale, only for him to now dispose of the land after becoming aware of the divorce cause.
- 29.** DW1 said that after the divorce cause, he sold the land, she then filed **ELC No. 2 of 2018**, seeking the

surrender of the **10 acres**, which the deceased replied to but never indicated to have disposed of the land even as they signed a consent dated **24/5/2018**, which was never adopted in court.

- 30.** DW1 said that he then lodged a complaint at Integrity House as per summons dated **13/7/2018**, which she later abandoned after her late husband talked to her. DW1 said that the deceased passed on before the consent and the joint affidavit could be adopted as an order of the court.
- 31.** DW1 told the court that, through the human rights office, he had also notified the interested party to vacate her land. DW1 said that in view of the foregoing, the transfer of the land to the plaintiff and the interested party was fraudulent.
- 32.** Further, DW1 produced an order dated **18/10/2002** in Eldoret Chief Magistrates Court, mediation agreement dated **28/11/2002**, order issued on **12/8/2003**, and **3/2/2006**, copy of originating summons dated **18/2/2006**, letter dated **16/3/2015**, judgment in the divorce cause delivered on **3/2/2017**, sale agreement dated **7/12/2015**, copy of plaint dated **15/1/2018**, statement of defence dated **20/2/2015**, joint affidavit dated **31/5/2018**, letters

dated **22/2/2020** and **15/2/2020**, as **D. Exhibits No. (1) - (15)** respectively.

- 33.** DW1 told the court that she was aware that the court lacked jurisdiction to handle matrimonial causes. DW1 admitted that her names were not included in the mother title to the suit parcel of land. DW1 said that she was not the one who signed the consent dated **24/5/2018** produced as **D. Exhibit No. (12)**. DW1 said that she became aware of the transfer of the land to the plaintiff when she was reported to the police by the plaintiff.
- 34.** Though she was all along aware of the presence of the interested party on the suit property, DW1 said that she took no action against them, save for **D. Exhibit No. (15)**. DW1 said that the church told her that her late husband had authorised them to be on the land. DW1 said that the three children were each given **2 ½ acres** of the land as per **D. Exhibit No. (4)**, which they have been occupying to date.
- 35.** DW1 said that after her children were given the land, she did not register a caution against the balance. Further, DW1 said that after her husband passed on, she did not participate in any succession proceedings, since **D. Exhibit No. (12)** was clear

that she was not going to claim any other property from him.

- 36.** DW1 said that she did not sign **D. Exhibit No. (12)** dated **24/5/2018**, nor was it within her knowledge. DW1 denied that her late husband bought her **5 acres**, following the court order, so that the suit property herein could remain with the deceased. DW1 said that she came to discover **D. Exhibit No. (12)** later.
- 37. Rev. Paul Gitau** testified as **DW2**. In support of the interested party's response to the amended defence and counterclaim based on the doctrine of estoppel. DW2 relied on a witness statement dated **7/2/2025** as his evidence-in-chief.
- 38.** He told the court that the deceased voluntarily and in good faith subdivided his land and transferred **0.3 acres** to the church as title No. **Waitaluk/Mabonde Block 2/Machungwa/603**, with clear boundaries and beacons, which they took possession of and have since developed without any objection from the defendant.
- 39.** DW2 relied on the title deed issued to them on **17/5/2022** and a copy of the donation agreement dated **29/3/2018** and photographs as **D. Exhibits No. (16), (17), and 18(a)-(g)**, respectively.

- 40.** DW2 said that the land was donated and voluntarily transferred to them by the deceased. DW2 confirmed that it was the plaintiff who effected the transfers by hiving off the land from title No. **448**, at the instructions of the deceased. DW2 told the court that the defendant lives next to the church in a separate parcel of land away from the church and the plaintiff's land.
- 41.** The plaintiff relies on written submissions dated **28/11/2025**, isolating four issues for the court's determination. As to whether the acquisition of the title was lawful, the plaintiff submits that his acquisition of the suit land is supported by documents starting with the sale agreement, a copy of the Land control board consent, spousal consent, and a duly executed and registered transfer form, which are free from any alleged fraud, illegality, misrepresentation, or irregularity under **Section 26** of the Land Registration Act. Reliance is placed on **Republic -vs- Kenya Urban Road Authority Exparte Tamarind Village Ltd [2015] KEHE 5453 [KLR].**
- 42.** On whether the suit property constituted a matrimonial home at the time of sale, the plaintiff submits that the counterclaim is not supported by

evidence that the property was acquired during the subsistence of marriage or that she directly or indirectly contributed to its acquisition or development. The plaintiff submits that the site visit by the court on **9/5/2023** found that there were no dwelling structures on the suit land save for the farm.

- 43.** Further, the plaintiff submits that the defendant has not been able to meet the requirements of **Section 6** of the Matrimonial Property Act **2013**. Reliance is placed on **RJ -vs- MKC alias MKL; [2025] KEHC 12532 [KLR]**. Further, the plaintiff submits that evidence available shows that the defendant, as the vendor, was judicially separated in **2001** and did not resume cohabitation until a divorce cause was filed in **2015**, leading to a dissolution of the marriage on **3/2/2017**.
- 44.** The plaintiff submits that as an estranged spouse, the defendant took no action to protect her interest by either lodging a caveat against the title or pursuing division of matrimonial property, especially when it is clear the vendor, until he passed on, had exclusive control of the suit property from **2007**. The plaintiff submits that out of the consent order dated **31/5/2018**, in **ELC No. 2 of 2018**, the defendant

consented against making any claims on the suit property.

- 45.** On whether lack of spousal consent invalidates the sale and transfer, the plaintiff submits that under **Section 12(1)** of the Matrimonial Property Act **2013**, the defendant had not only separated but also divorced the vendor, hence rendering their legal relationship non-existent, or severed. Reliance is placed on **CKS -vs- SOL & Another [2025] KECA 103**, where a sale of land to a third party by an estranged spouse was upheld. The plaintiff submits that in this instance, he was a *bona fide* purchaser for value without notice of any adverse claim by the defendant.
- 46.** As to estoppel, the plaintiff submits that the defendant is estopped from denying the validity of the sale and transfer, for she did not object at the time of sale, by way of a caveat or warning to third parties, and it was only after the death of the vendor that she came forward to challenge the transaction.
- 47.** The plaintiff submits that the defendant's conduct of fence sitting and after long occupation of the land by the plaintiff, waking up, estops her from denying the said transaction. Reliance is placed on **Serah Njeri**

**Mwobi vs John Kimani Njoroge [2013] KECA 501 [KLR].**

- 48.** The interested party relies on written submissions dated **24/11/2025**, isolating three issues for the court's determination. On whether the counterclaim is time-barred by the doctrine of estoppel, the interested party submitted that the defendant, having previously sworn an affidavit and entered into a court-sanctioned consent in **Kitale ELC No. 2 of 2018**, relinquished all her claim over the suit property, to be barred from asserting any proprietary or beneficial interest thereof.
- 49.** Further, the interested party submits that the counterclaim directly contradicts the defendant's earlier solemn declaration and amounts to an attempt to approbate and reprobate under **Section 44** of the Evidence Act. Reliance is placed on **Accredo Ag & 3 others -vs- Stefano Uccelli & another [2018] KEHC 7922 (KLR), John Florence Maritime Service Ltd & Another -vs- Transport & Infrastructure & Others [2015] eKLR,** and **Kenindia Assurance Company Ltd -vs- New Nyanza Wholesalers Ltd [2017] eKLR.**
- 50.** Regarding trespass, the interested party submits that since the defendant has no ownership rights,

consent, or lawful justification, her presence on the suit property is an act of trespass under **Section 3(1)** of the Trespass Act.

- 51.** The interested party submits that the deceased lawfully subdivided the land and donated a portion to the church in a procedural, transparent, and regular manner with no challenge from the defendant, making the title deed held by the interested party indefeasible. The interested party submits that the jurisdiction is everything as held in the **Owners of Motor Vessel Lillian "S" -vs- Caltex Oil (K) Ltd [1989] KLR 1**, and in **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & Others [2013] eKLR**.
- 52.** In this case, the interested party submits that the counterclaim invites the court to declare the suit property matrimonial property, yet under the Matrimonial Property Act **2013**, this court lacks such jurisdiction. The interested party urges the court to decline jurisdiction and find the counterclaim incompetent and fatally defective for want of jurisdiction.
- 53.** The defendant relies on a written submission dated **5/12/2025**, isolating two issues for the court's determination. On whether the title deed held by the plaintiff is void for lack of spousal consent, the

defendant submits that **Section 93(3)** and **(4)** of the Land Registration Act is meant to protect a spouse and ensure that no land transactions are carried out without their knowledge or consent. In this instance, the defendant submits that none was procured or obtained from her, making the transaction invalid, especially when the plaintiff alleges that the deceased told him that she was a mere licensee on the suit property. The defendant submits that the spousal consent obtained from Rose Njeri Njuguna, who was not in occupation or use of the land, could not equitize the transactions.

**54.** As to fraud, the defendant submits that under **Section 26(1)** of the Land Registration Act, the root title of the plaintiff suffers infirmities of law which have been specifically pleaded and proved. Reliance is placed on **Munyu Maina -vs- Hiram Gathiha Maina [2013] eKLR, Vajah Morjaria -vs- Nansingh Madhusingh Darbar & Another [2000] eKLR,** and **Moses Parantai & Another -vs- Stephen Njoroge Macharia [2020] eKLR.** The defendant urges the court to invalidate the title under **Section 80** of the Land Registration Act.

**55.** The issues calling for my determination are:

- (1) If the plaintiff holds a valid title to the suit property.**
- (2) If the defendant has trespassed on the suit property.**
- (3) If the plaintiff is entitled to the relief sought.**
- (4) Whether the counterclaim before a court with competent jurisdiction.**
- (5) What is the order as to costs?**

**56.** A cause of action refers to an act on the part of the defendant that gives the plaintiff a reason to complain. See **DT Dobie & Company (Kenya) Limited -vs- Muchina & another [1980] KECA 3 (KLR)**. In this suit, the plaintiff pleaded that he lawfully and regularly acquired the suit properties from the late John Ndegwa in **December 2015**, but the defendant has denied him access, use, occupation, and development of the same to date. The basis of the defendant's defence and counterclaim is that the suit properties were acquired through fraud, misrepresentation, and irregularities since she was in use, or occupation of the land as matrimonial property, and her spousal consent was not sought or obtained, rendering the titles or transactions invalid, null, and void.

- 57.** In reply to the defence and counterclaim, the plaintiff pleads that the court has no jurisdiction to hear and determine the counterclaim and that the defendant was an estranged spouse, who eventually divorced the vendor on **3/2/2017**, and further that, the defendant is estopped in law from asserting beneficial or spousal interest in the land after renouncing her claims in a consent order dated **31/5/2018** in **ELC No. 2 of 2018**, that was later dismissed on **25/9/2018** for want of prosecution.
- 58.** It is trite law that where a registered proprietor's title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. See **Munyu Maina -vs- Hiram Gathiha Maina** (*supra*). In **Dina Management Ltd -vs- County Government of Mombasa & Another [2013] KESC 30 [KLR]**, the court held that a title is not an end result but rather the culmination of a legally sound process.
- 59.** In **Sehmi & Another -vs- Tarabana Co. Ltd & Others [2025] KESC 21 [KLR]**, the court said that a transaction cannot attract the protection of equity, for equity follows the law and that an innocent purchaser must establish that he purchased a legal estate without notice and that a purchaser will only be regarded as *bona fide*, if he buys property in good

faith without notice of any defects or claims against the title. The court said that a title that is illegally obtained or obtained through unlawful means cannot be protected, even if the purchaser was not aware of the illegality.

- 60.** In **Mbarak -vs- Freedom Ltd [2024] KECA 160 [KLR]**, the court observed that possession carries the day as was held in **Bandi -vs- Dzomo & Others (Civil Appeal 16 of 2020) [2022] KECA 584 (KLR) (24 June 2022) (Judgment)**. In **Pamba Ongweno Amila -vs-John Juma Kutolo [2015] KECA 867 [KLR]**, the court said that fraud is a conclusion of law and the facts alleged to be fraudulent must be set out and evidence led to prove fraudulent intent, whose standard, as held in **Kagina -vs- Kagina & Others [2021] KECA 242 [KLR]**, is beyond a balance of probabilities but not as high as in criminal cases.
- 61.** In this suit, the plaintiff has produced the paper trail he used to acquire the titles from the late John Ndegwa, together with a spousal consent from Rose Njeri. The defendant has admitted that she had separated from the vendor and also filed a divorce case during his lifetime. Documents produced by the defendant clearly show that the two had been

litigating over the suit property for many years. The defendant does not dispute that she had filed a similar suit seeking similar orders as those in the counterclaim. The defendant did explain to the court why she did not prosecute such a suit during the lifetime of the deceased former spouse.

- 62.** In **CKS -vs- SOL & Another Civil Appeal No. E184 of 2022 [2025] KECA 103 [KLR] (24<sup>th</sup> January 2025) (Judgment)**, the court said that a High Court's jurisdiction is limited to making orders on how matrimonial property is shared. In this suit, I make a finding that this court is bereft of jurisdiction to hear and determine whether the suit property, before it was sold, transferred, subdivided, and registered in favour of the plaintiff, was matrimonial property or not.
- 63.** As to whether the plaintiff's acquisition of the title to the suit property offended the Law of Contract Act, there was noncompliance with **Section 93(3) (b)** of the Land Registration Act, and was subject to overriding interests, the defendant did not seek in the right court declaration of her alleged rights to be declared as superior to those of Rose Njeri, under **Section 6(3) and (7)** of the Matrimonial Property Act, **2013**.

- 64.** There is no evidence before me that a competent court has declared in accordance with **Section 17** of the Matrimonial Property Act the right of the defendant vis-à-vis those of the late John Ndegwa as a spouse or former spouse. There is no evidence that the defendant under **Section 12(1)** of the Matrimonial Property Act had such rights pronounced by a court of law.
- 65.** Jurisdiction is everything. As much as the court can determine overriding interests, in this case, after the divorce was allowed, the defendant, before her husband died, had filed a suit which was dismissed for non-prosecution. Instead of reviving it, she has filed a counterclaim, yet there was a consent order in the former suit settling the issue of her interests in the suit property in favour of her late husband. The court is not persuaded that the said consent was not signed by the defendant and is not a bar to revival of determined issues under the doctrine of *res judicata*.
- 66.** Fraud, illegality, and misrepresentation must be specifically pleaded and proved to the required standards. The defendant alleges that there was no spousal consent and that the vendor instead misrepresented to the plaintiff that she was a mere

licensee to the land, yet she was on the land as part of their matrimonial home.

**67. Section 93** of the Land Registration Act concerns interest in land subject to co-ownership. The burden was on the defendant to establish, prove, and indicate the nature, particulars, and elements of the alleged illegalities, irregularities, fraud, or misrepresentation in the said transactions leading to the issuance of titles to the plaintiff. The first step should have been to show that the vendor owed the defendant a duty or a responsibility as a spouse or a former spouse, and that Rose Njeri's spousal consent could not suffice under the circumstances. As indicated above, the defendant had filed a former suit to which a consent order was recorded before the court relinquishing any interests in the suit property. The suit was not prosecuted until it was dismissed.

**68.** From the site visit report, it was established that the defendant's alleged matrimonial home was not within the disputed portion. The defendant did not tender any evidence that she had lodged a caveat against the title register on account of spousal rights or interests.

- 69.** Similarly, the defendant has not rebutted the consent duly executed and filed in her own suit, relinquishing any claim on the subject parcel on **31/5/2018**. The defendant has not tendered evidence that the plaintiff ignored her occupation, use, and or developments on the suit property to defeat his claim that he was not an innocent purchaser for value without notice of any adverse claims by the defendant.
- 70.** The defendant has not refuted the assertion that, despite filing **ELC No. 2 of 2018**, she failed to prosecute it during the lifetime of the late John Ndegwa. Similarly, it is not clear why the defendant, since the sale, transfer, registration, and subdivision of the titles in favour of the plaintiff and the interested party in **2015**, had to wait for close to seven years to seek to recover the suit properties. It is not enough to allege illegality or fraud without offering tangible and cogent evidence, as held in **Fanikiwa Limited & 3 others -vs- Sirikwa Squatters Group & 17 others [2025] KESC 79 (KLR)**.
- 71.** As held in **RJ -vs- MKC alias MKL** (*supra*), it is not enough for a spouse to allege marriage without proof of particulars in acquiring or developing the suit

property. See **Republic vs KURA & Others** **Exparte Tamarind Village Ltd** (*supra*).

- 72.** Coming to the reliefs sought, the plaintiff seeks declaratory reliefs, on ownership, a permanent injunction, and general damages for trespass. Trespass is a violation of the right to use, possession, or occupation of land. It is governed by **Section 3(1)** of the Trespass Act. A claimant must prove that he had the right to immediate and exclusive possession of the land. See **M'Mukanya -vs- M'Mmbijiwe [1984] eKLR**. It is not a case of wrongful entry as held in **Margaret Iminza Luyayi -vs- Moses Opudo Mudaka [2019] KEELC 2886 (KLR)**.
- 73.** A claimant has to prove ownership and the acts of invasion or occupation by the defendant without any justifiable cause, as held in **Ochako Obinchu -vs- Zachary Oyoti Nyamongo [2018] KEELC 3418 (KLR)**. The title deed held by the plaintiff has not been impeached on account of fraud or illegality.
- 74.** The defendant has been unable to show justification for denying the plaintiff use of the suit property since he became the registered owner in **2015**. The defendant had all the time to prove her claim based on matrimonial rights until her alleged husband passed on. The doctrine of estoppel prevents the

defendant from denying that she was privy to the consent order, acquiesced to the former suit, was aware of the sale, transfer, subdivision, and registration of the suit properties, and only came to challenge them after almost 6 years. See **Serah Njeri Mwobi -vs- John Kimani** (*supra*).

- 75.** Justification for why the defendant had to wait for over five years to assert her rights, long after her late husband passed on, has not been explained. The defendant has been unable to demonstrate any overriding interest over the suit properties or impeach the title under **Sections 24, 25, and 26** of the Land Registration Act. Her counterclaim is filed before a court lacking jurisdiction. The upshot is that I find no basis why the plaintiff should be denied full use, occupation, and possession of the suit property.
- 76.** The plaintiff has been unjustifiably denied use and occupation of the suit property since **2015**.
- 77.** Trespass is actionable per se without proof of damages. See **Kenya Power and Lighting Company -vs- Ringera & Others [2022] KECA 104 [KLR] (4<sup>th</sup> February 2022) (Judgment)**. Denial of ownership by the defendant for over **7 years** has not been explained.

- 78.** In *Philip Ayaya Aluchio -vs- Crispinus Ngayo [2014] eKLR*, the court said that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or costs of restoration, whichever is less.
- 79.** The plaintiff has pleaded that the land is under sugarcane from which the defendant has been deriving income. I think the plaintiff is entitled to compensation for general damages.
- 80.** Consequently, the court hereby issues the following orders:-
- (a) A declaration is issued that the plaintiff is the lawful owner of Title No. Waitaluk/Mabonde Block 2/Machungwa/602.**
  - (b) A permanent injunction is granted restraining the defendant from further encroachment and or trespass onto Title No. Waitaluk/Mabonde Block 2/Machungwa/602.**
  - (c) The defendant shall hand over vacant possession of the land within 90 days from the date hereof, in default, eviction to issue at her costs and expenses.**
  - (d) General damages of Kshs.5,000,000/=.**
  - (e) Costs of the suit to the plaintiff.**
- 81.** Orders accordingly.

**Judgment dated, signed, and delivered** via **Microsoft Teams/Open Court** at **Kitale** on this **11<sup>th</sup>** day of **February 2026**.

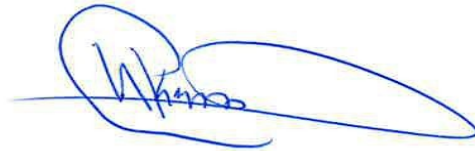
**In the presence of:**

Court Assistant - Dennis

Miano for the plaintiff - present

Nabwile for the interested party - present

Gemenet for the defendant - present

A handwritten signature in blue ink, appearing to be 'C.K. Nzili', written over a large, light grey watermark that reads 'ORIGINAL COPY' diagonally across the page.

**HON. C.K. NZILI  
JUDGE, ELC KITALE.**