

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELCLC NO. E039 OF 2024

HARRISON MAKAU MUTISYA:.....:PLAINTIFF

VERSUS

MARTIN MUTHII KANGARA:.....:DEFENDANT

JUDGEMENT

The Plaintiff avers that at all material times prior to this suit he was the registered proprietors of all that parcel of land known as L.R NO, 12715/690 measuring 2.024 Hectares which is situate within Syokimau in Athi River Sub county Machakos County That the Plaintiff is the bonafide legal and registered owner of the suit property having acquired it for value consideration and registered as proprietor pursuant to a Conveyance registered against the Grant on 28th December 1989. That the Plaintiff has been in actual ownership and control of the suit property until around November 2023 when the Defendant so overbearingly, together with a battalion of goons attacked the suit property without any cause or justification and commenced construction thereon.

That the Defendant has proceeded to distort the original state of the land by excavating and setting up foundation footings for construction of residential and commercial properties. The Plaintiff avers that these actions by the Defendant and his agents

amount to trespass to the suit property belonging to the Plaintiff and an unlawful interference with the Plaintiffs constitutionally protected right to property ownership.

The Plaintiff prays that judgment be entered against the Defendant for;

- a) A permanent injunction restraining the Defendant, their agents, servants, employees, assigns or otherwise however from trespassing into and /or interfering, in any way, with the plaintiff quiet enjoyment, possession and use of the suit property and /or the developments thereon and/or from offering for sale, selling, transferring, alienating, allocating or in any way disposing of the suit property known as L.R NO. 12715/690.
- b) An order for eviction compelling the Defendant to vacate the property known as L.R NO. 12715/690
- c) An order compelling the Defendant to demolish all permanent structures and restore the suit land to its reasonable original state.
- d) Damages for trespass.
- e) Costs of the suit.
- f) Interest on (d) and (e) above at court rates.

The court has considered the pleadings, evidence presented before it, submissions made as well as the authorities relied upon by the party. The Defendant was served but failed to attend court or file any defence.

The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows;

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows;

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

I have carefully perused the documents produced as exhibits and find that the Plaintiff is the registered owner of the suit property. He produced a copy of the grant for LR No. 127/690 and photographs of the suit property PEx1 and 3 and the documentary evidence has not been challenged. The Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR held that;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

Section 26 of the Land Registration Act which guarantees the concept of indefeasibility of title does not extend to any property that has been found to have been unlawfully acquired. The Court of Appeal in Attorney General vs Torino Enterprises Limited (Civil Application 84 of 2012) (2022) KECA 78 (KLR) (4 February 2022) (Judgment) held that;

“We have considered the provisions of section 26 of the Land Registration Act (repealed) in light of the provisions of Article 40 of the Constitution which guarantees protection of right to property and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of the Constitution which states that: “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” Guided by the provisions of Article 40 (6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the suit land was

unlawfully acquired. See Denis Noel Mukhulo & Another v. Elizabeth Murungari & Another [2018] eKLR.”

The Plaintiff testified that he is the bonafide legal and registered owner of the suit property L.R. No. 12715/690 having acquired it for value consideration and was registered as proprietor in the Grant on 28th December 1989. That he took and control of the suit property until around November 2023 when on a routine visit he found the Defendant and his agents commencing construction thereon. They proceeded to distort the original state of the land by excavating and setting up foundation footings for construction of residential and commercial properties. He reported the matter to Mlolongo Police Station vide OB No. 18/29/11/23 PEx 2. I find that this evidence has not been controverted. I find that the Plaintiff is the bonafide legal and registered owner of the suit property L.R. No. 12715/690.

The Plaintiff claims for damages for trespass. The Court of Appeal was of this opinion in Jamal Salim vs Yusuf Abdulahi Abdi & another (2018) eKLR and stated that;

“In the text Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923, trespass to land is defined as follows :- "Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.

At page 927 of the same text discusses 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.”

It is therefore not necessary for one to establish ownership of land to sustain a claim for trespass. It is enough that the person suing is in possession.”

It has not been disputed that the Defendant trespassed on the suit property. The Defendant invaded the suit property in November 2023 with a gang of men. They started to earnestly started excavating the land and setting up foundation footings for construction of residential and commercial properties (PEx 2 are the photographs).

In Philip Ayaya Aluchio vs Crispinus Ngayo (2014) eKLR the court held that;

“The defendant has constructed on the plaintiff's land. This in itself is damage and wastage of the plaintiff's land. The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage?. It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately before and immediately after the trespass or the cost of restoration, whichever is less. See Hostler – VS – GreenPark Development Co. 986 S. W 2d 500 (No. ct App. 1999).

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass. There was no evidence adduced on the nature of house which the defendant has constructed on the suit land. The court is at a disadvantaged position in reaching at a cost which might be reasonable for restoration of the

property to its former state. However as I have found that the plaintiff is entitled to general damages for trespass, I will award a nominal sum of Kshs. 100,000/= as general damages for trespass. This cost will go towards restoration of the suit land to its former state.”

I find that at the time of the trespass by the suit property was vacant. However, the Plaintiffs have not adduced evidence as to the status of their suit land before and after the trespass and as they are entitled to general damages for trespass, the court will award a nominal sum of Kshs 100,000/= as damages. I find that the Plaintiff has proved his claim on a balance of probabilities and I grant the following orders;

1. A permanent injunction restraining the Defendant, their agents, servants, employees, assigns or otherwise however from trespassing into and /or interfering, in any way, with the Plaintiff quiet enjoyment, possession and use of the suit property and /or the developments thereon and/or from offering for sale, selling, transferring, alienating, allocating or in any way disposing of the suit property known as L.R NO. 12715/690.
2. The Defendant is to vacate the property known as L.R NO. 12715/690 within 30 (thirty) days from the date of service of this order and in default eviction order to issue.
3. Kshs. 100,000/= general damages for trespass.
4. Costs of the suit.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF
FEBRUARY 2026.**

N.A. MATHEKA

JUDGE

ORIGINAL