

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC CASE NO. 244 OF 2017**

**PETER MAINGI MUMO:.....:PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH MAKAU MBONDO:.....:DEFENDANT/RESPONDENT**

**JUDGEMENT**

The Plaintiff avers that at all material times he was the beneficial owner in possession and occupation of properties known as PLOT NO. MAVOKO MUNICIPALITY BLOCK 6/864 and 6/911 situated within Machakos County. The Plaintiff further states that on or before 3<sup>rd</sup> December 2015 the 1<sup>st</sup> Defendant fraudulently caused to be registered in his name PLOT NO. MAVOKO MUNICIPALITY BLOCK 6/864. The 3<sup>rd</sup> Defendant on before 31<sup>st</sup> January 2018 fraudulently caused to be registered in his name PLOT NO. MAVOKO MUNICIPALITY BLOCK 6/911. The Plaintiff got to know of these illegal activities when the 1<sup>st</sup> Defendant sued him in ELC No. 1 of 2017 Mavoko Law Courts seeking restraining orders; The Plaintiff prays for judgement against the defendants for;

- a. Stay of proceedings in respect of Senior Principal Magistrates Court ELC 1 of 2017.
- b. A declaration that the Plaintiff is the owner and entitles to possession of Plot of Plot No. 70 (now registered as MAVOKO MUNICIPALITY BLOCK 6/911) and Plot No.71 (now registered MAVOKO MUNICIPALITY BLOCK 6/864) all situated within Mavoko Sub County Machakos County.
- c. An order directing the Registrar of Lands Machakos to rectify the register to reflect the Plaintiff Joseph Makau Mbondo as the legally registered proprietor of Plot No. 70 (now registered as MAVOKO MUNICIPALITY BLOCK 6/911) and Plot No.71 (now registered MAVOKO MUNICIPALITY BLOCK 6/864).
- d. An order of permanent injunction do issue restraining the Defendants jointly or severally by themselves and their agents, servants, workmen or otherwise whosever from trespassing, interfering with alienating, disposing or in any other way howsoever with the property known as Plot No. 70 PLOT NO. (now registered MAVOKO MUNICIPALITY BLOCK 6/911) and Plot No. 71 (now PLOT NO. MAVOKO MUNICIPALITY BLOCK 6/864).
- e. General damages for trespass (if proved).
- f. Costs of this suit.

The 1<sup>st</sup> Defendant denies that the Plaintiff purchased land known as Plot No. MAVOKO MUNICIPALITY BLOCK 6/864 and 6/911. That the Machakos County Government had capacity to sell land to the plaintiff on the 11<sup>th</sup> January 1995 or at any time or at all. That the Plaintiff is the legal owner of plot No. 6/911 (Plot no 70) and MAVOKO MUNICIPALITY BLOCK 6/864 (Plot No 71) or at all. That the Defendant on the 18<sup>th</sup> January 2017 or at any time or at all trespassed into property allegedly belonging to Plaintiff. That any notice whatsoever was ever issued to the defendant by the Plaintiff or any person claiming ownership of the properties in the year 2017.

The 1<sup>st</sup> and 3<sup>rd</sup> Defendants filed statements of defence dated 9<sup>th</sup> October 2017 and 13<sup>th</sup> October 2017 respectively. They denied the allegations in toto. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants produced title deeds to the said suit properties.

The court has considered the pleadings, evidence presented before it, submissions made as well as the authorities relied upon by the party. The issues for determination are:

1. *Who is the lawful proprietor of the land parcel known Mavoko Municipality Block 6/864 and 6/911?*
2. *What orders should this court issue?*

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.”*

PW1, Julius Mwanza Ndundu testified that he was a Councillor for KMC Ward within Athi River between 1974 and 1993. That Joseph Makau Mbondo was allocated Plot 70 and 71 and that he was in the allocation committee. PW2 Dominic Kioko Makau testified that his father the late Joseph Makau Mbondo was

allocated plot No. 70 and Plot 71 was allocated to Julius L.K Ole Ntaiya who never accepted the offer and it was later allocated to his father. His father took possession and developed the said plots. That the allotment issued to his father was never cancelled. That he lived on the plots since 1983 and has invested on the properties by building temporary and permanent structures.

It is not in dispute that PLOT NO. MAVOKO MUNICIPALITY BLOCK 6/864 is registered in the name of the 1<sup>st</sup> Defendant and PLOT NO. MAVOKO MUNICIPALITY BLOCK 6/911 is registered in the name of the 3<sup>rd</sup> Defendant.

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.”*

DW1 the 1<sup>st</sup> Defendant testified that he was allocated plot No. 71 Athi River by the Ministry of Lands on 11<sup>th</sup> January 1995. He paid stand premium of Kshs 21,000/= and the plot was surveyed. That he never took possession as the Plaintiff was there hence he filed the suit ELC No. 1 of 2017.

DW4, the 3<sup>rd</sup> Defendant testified that he was allocated plot No. 70 Athi River by the Ministry of Lands on 11<sup>th</sup> January 1995. He paid stand premium of Kshs 21,000/= and the plot was surveyed. He later sold the plot to the 1<sup>st</sup> Defendant in 2013. He however had never taken possession.

I have perused the exhibits adduced in this court in great detail. PW3 Danial Makau a government surveyor produced a Surveyors report dated 17<sup>th</sup> October 2024 as PEx 20. Corroborating the Plaintiff's case, he testified that according to the records at the County Government the suit plots were allocated in 1995 to Joseph Makau Mbondo and Joseph L.K Ole Ntaiya as per the minutes of the plot allocation committee dated 12<sup>th</sup> October 1994 (Plaintiff's bundle of documents dated 21<sup>st</sup> December 2021 at pages 9 to19). These allocations were never cancelled. He visited the plots and found there had been developed by Joseph Makau Mbondo. The Plaintiff produced a letter from the Mavoko Municipal Council dated 20<sup>th</sup> November 2016 confirming the ownership of plot 70 (Plaintiff's bundle of documents dated 21<sup>st</sup> December 2021 at page 20). He also produced the land rates payment for the two plots from 2019 (Plaintiff's bundle of documents dated 21<sup>st</sup> December 2021 at pages 21 to 24). It is the Plaintiffs evidence that the ownership documents of the said plots were burnt at their Lukenya home in 2015 and they had reported to the police and produced the OB number (Plaintiff's bundle of documents dated 21<sup>st</sup> December 2021 at pages 31).

The 1<sup>st</sup> Defendant produced an allotment letter dated 11<sup>th</sup> January 1995 for plot No. 71 and an Allotment letter dated 24<sup>th</sup> May 2010 for the same plot. The 3<sup>rd</sup> Defendant produced a similar allotment letter dated 11<sup>th</sup> January 1995 for plot No. 70. It is both their documentary evidence that these plots were reallocated to them as the first allottees never accepted the offer. It is curious to note that the 3<sup>rd</sup> Defendant was allocated the said plot when he was 18 years old! It is also important to note that the two allotment letters bear the same reference number 39711/XXV. The letters are dated the same date and bear the same postal address. I find these letters fraudulent and the subsequent conduct of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants equally curious in that they never attempted or took possession until 2017 when they went to court. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants defence is a fabrication and I reject it.

I find that the Plaintiff has established that they are the legitimate proprietors of a portion of the suit properties by allocation and hence entitled to the orders of rectification.

Section 80 of the Land Registration Act provides as follows;

*“80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is*

*satisfied that any registration was obtained, made or omitted by fraud or mistake.*

*(2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”*

This section gives the court powers to order for rectification of a register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. From the evidence adduced I find that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants acquired the suit properties through fraud and or misrepresentation. The suit plots were not available for allocation in 1995 if at all as there had already been allocated to the Plaintiff who had taken possession and developed the same. This explains why the 1<sup>st</sup> and 3<sup>rd</sup> Defendants never took possession or occupied the suit plots. Indeed, the Plaintiff produced photographs showing the developments on the suit plots (Plaintiff's bundle of documents dated 21<sup>st</sup> December 2021 at pages 21 to 24).

The Plaintiff claims for general 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.”*

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 Plaintiff has been in possession at all material times and it is not disputed that the Defendants never took possession. I find that the claim for general damages for trespass has not been proven and the same will not be awarded. I find that the Plaintiff has proved his case and I grant the following orders;

1. A declaration that the Plaintiff is the owner and entitles to possession of Plot of Plot No. 70 (now registered as MAVOKO MUNICIPALITY BLOCK

6/911) and Plot No.71 (now registered MAVOKO MUNICIPALITY BLOCK 6/864) all situated within Mavoko Sub County Machakos County.

2. An order directing the Registrar of Lands Machakos to rectify the register to reflect the Plaintiff Joseph Makau Mbondo as the legally registered proprietor of Plot No. 70 (now registered as MAVOKO MUNICIPALITY BLOCK 6/911) and Plot No.71 (now registered MAVOKO MUNICIPALITY BLOCK 6/864).
3. An order of permanent injunction do issue restraining the Defendants jointly or severally by themselves and their agents, servants, workmen or otherwise whosoever from trespassing, interfering with alienating, disposing or in any other way howsoever with the property known as Plot No. 70 PLOT NO. (now registered MAVOKO MUNICIPALITY BLOCK 6/911) and Plot No. 71 (now PLOT NO. MAVOKO MUNICIPALITY BLOCK 6/864).
4. Costs of this suit to be borne by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24<sup>TH</sup> DAY OF FEBRUARY 2026.**

**N.A. MATHEKA**

**JUDGE**

ORIGINAL