

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. E036 OF 2023

DARIUS PHILIP MBOGO..... PLAINTIFF

VERSUS

PATRICK NJUGUNA KUBAI.....DEFENDANT

JUDGMENT

A. Plaintiff's claim

1. By a plaint dated 24.04.2023 the plaintiff sued the defendant seeking the following reliefs against him;

- a) *A declaration be and is hereby issued that the Plaintiff is the lawfully registered proprietor of the property known as Land Reference Number 14490/1/MN registered at the Coast Central Land Registry at Mombasa as CR 49618 to the exclusion of any other person including the Defendant herein.*
- b) *A declaration that the Defendant has no legal right or recognizable interest over the property known as Land Reference Number 14490/1/MN registered at the Coast Central Land Registry at Mombasa as CR 49618 and any title documents he may hold are invalid, null and void and stand revoked forthwith.*
- c) *An order of eviction do issue and the Officer Commanding, Bamburi Police Station or any nearby station do ensure compliance.*
- d) *A permanent injunction/prohibition be issued restraining the Defendant either by himself, his agents or servants, agents, employees or any other person whatsoever acting for and/or*

on his behalf from interfering with the Plaintiffs right to quiet and peaceful possession and occupation of the suit property known as Land Reference Number 14490/1/MN registered at the Coast Central Land Registry at Mombasa as CR 49618.

- e) Loss of income for the duration of trespass at a sum of Kshs. 500,000.*
- f) General damages for the trespass.*
- g) Costs of this suit together with interest thereon at such rate and for such period of time as this Honorable Court may deem fit to grant.*
- h) Any such other further relief as this Honorable Court may deem appropriate.*

2. The plaintiff pleaded that at all material times he was the registered proprietor of parcel No.14490/I/MN (CR 49618) (*the suit property*) which he bought for valuable consideration from the previous registered owner in 2010. He pleaded that upon taking possession he fenced the suit property using barbered wire and erected a temporary structure for a caretaker at a cost of about Kshs. 350,000/=.
3. It was pleaded that on an undisclosed date the defendant invaded the suit property and destroyed the fence and caretaker's structure. It was further pleaded that the defendant had proceeded to illegally construct his own house on the suit property without any approved building plans.
4. It was the plaintiff's case that the defendant's entry and occupation of the suit property was unlawful and had

deprived him of his right to use and enjoy the suit property without any lawful justification or excuse.

5. The plaintiff further pleaded that despite issuance of a demand and notice of intention to sue the defendant had failed to vacate the suit property thus making the instant suit necessary.

B. Defendant's defence

6. The defendant filed a statement of defence and counter-claim dated 01.03.2024. By his defence, he denied liability for the plaintiff's claim. In particular, he denied that the plaintiff was the registered proprietor of the suit property and put him to strict proof thereof. The defendant pleaded that he was the legitimate owner of the suit property by reason of having bought it on 11.05.2021 from one Denis Barasa who was an allottee of the same within Beach Komba Settlement Scheme (*the settlement scheme*).
7. The defendant pleaded that as the lawful owner then took possession of the suit property and construction a house thereon. He contended that he could not be deemed a trespasser on own his land.
8. By his counter-claim, the defendant reiterated the contents of his defence and pleaded that he took possession of and

developed the suit property in 2021 with full knowledge of, and without any objection by, the plaintiff. It was further pleaded that the plaintiff had wrongfully caused the defendant to be charged with a criminal offence at Shanzu Law Courts in connection with his occupation of the suit property.

9. As a result, the defendant sought the following reliefs in his counter-claim;

- a) *That this honourable court do order that the titled issued in the name of the plaintiff be cancelled and rendered null and void.*
- b) *Specific performance for the defendant to be registered as the owner of the suit property.*
- c) *That the plaintiff be ordered to pay the defendant damages for the interference with quite possession and enjoyment of the suit property.*

C. Plaintiff's rejoinder

10. There is no indication on record of the plaintiff having filed any reply to defence or defence to counter-claim. Instead, the plaintiff adopted a very usual mode of responding to the defendant's pleading. The plaintiff filed what he termed as a "further/supplementary affidavit" whereby he went to great length to discredit the defendant's defence and counter-claim. In the said affidavit, he pleaded that Denis Barasa had

no legal interest in the suit property which he could sell to, or confer upon, the defendant. For purposes of this suit, the court shall treat the plaintiff's said affidavit as a defence to the counter-claim.

D. Trial of the action

11. At the trial hereof, the plaintiff called 4 witnesses and closed his case. The gist of the plaintiff's evidence generally mirrored the contents of his plaint. He also produced the documents in his list of documents as exhibits.
12. On his part, the defendant called 2 witnesses and closed his case. The defendant adopted the contents of his witness statement dated 01.03.2024 as his evidence in chief and produced the 2 documents in his list of documents as exhibits. The gist of his evidence was that he bought the suit property for valuable consideration from one, Denis Barasa who was an allottee thereof in the settlement scheme.

E. Direction on submissions

13. Upon conclusion of the hearing, the parties were granted timelines within which to file and exchange their written submissions. The record shows that the plaintiff filed submissions dated 02.12.2025 but the defendant's

submissions were not on record by the time of preparation of the judgment.

F. Issues for determination

14. The court has noted that the parties did not file an agreed statement of issues for determination. The record shows that the defendant filed a list of 8 issues whereas the plaintiff did not file any. As such, the court shall frame the issues for determination as stipulated under Order 15 rule 2 of the Civil Procedure Rules. Under the said rule, a court may frame issues from any of the following;

- a. *The allegations contained in the pleadings or answers to interrogatories.*
- b. *The allegations made of oath by or on behalf of the parties.*
- c. *The contents of documents produced by the parties.*

15. The court has perused the pleadings evidence and documents on record. The court is of the view that the main issues for determination herein as follows;

- a. *Whether the plaintiff has proved his claim against the defendant.*
- b. *Whether the defendant had proved his counter-claim against the plaintiff.*
- c. *Whether the plaintiff is entitled to the reliefs sought in the suit.*

d. Whether the defendant is entitled to the reliefs sought in the counter-claim.

e. Who shall bear costs of the suit and counter-claim.

G. Analysis and determination

a) Whether the plaintiff has proved his claim against the defendant

16. The court has considered the material and submissions on record. The plaintiff's claim was quite straightforward. That he was the registered proprietor of the suit property hence entitled to enjoy all the rights that come with such ownership. He contended that the defendant had wrongfully entered the suit property, constructed a house thereon and occupied the same without any lawful justification.

17. In a bid to demonstrate his ownership, he produced a copy of the relevant transfer document and certificate of title for the suit property as exhibits. He also called the land registrar (PW2) who testified that the records in his custody indicated that the plaintiff was the registered proprietor of the suit property and that there were no encumbrances registered against the title. There were no registration entries relating to either Denis Barasa or the defendant in the records kept by the land registrar.

18. The court is satisfied on the basis of the material on record that the plaintiff is the legitimate and registered proprietor of the suit property. There was no evidence to demonstrate that he acquired title to the suit property on account of fraud, misrepresentation, illegality or any corrupt practice.
19. The court is further satisfied that the plaintiff is entitled to immediate possession of the suit property. He is legally entitled to enjoy all the rights of a registered proprietor under *Sections 24 and 25 of the Land Registration Act*. The defendant admitted to having entered the suit property in 2021. He conceded that he constructed a house thereon and occupied the suit property. As a consequence, the court is satisfied that the plaintiff has proved his claim against the defendant on a balance of probabilities as required by law.

b) Whether the defendant has proved his counter-claim against the plaintiff

20. The court has considered the material and submissions on record. The defendant's counter-claim was also quite straightforward. That he was the legitimate owner of the suit property by reason of having purchased it from Denis Barasa who was an allottee of the same in the settlement scheme. It was his case that land in the said scheme was still

unregistered but he had a right to occupy and develop the property he had bought for valuable consideration. He even called one witness who had witnessed his sale agreement with Barasa.

21. When the defendant was questioned during cross-examination on how he established that Barasa had a right to sell the suit property he stated as follows:

“I inquired from the committee of the area and confirmed that the vendor was the owner. No, I did not conduct a search at the Land Registry. I did not conduct a survey of the plot. No, the chief did not give me a letter to show who was the owner of the plot. I did not verify if the committee was officially registered. Referred to the sale agreement. It states that Barasa was the seller. The agreement does not state that he is the owner. I do not have anything to prove that Denis Barasa was the owner of the plot.....”

22. The court is of the view that the defendant did not undertake any or any serious due diligence before purchasing the suit property. If the defendant believed that the property fell within a settlement scheme, then why did he not take steps to verify details of its allocation from the relevant settlement officer in the department of land adjudication and settlement? Why did the defendant not bother to consult even the local chief or assistant chief? The evidence of the

land registrar (PW2) was to the effect that the original or mother title was first registered in 2007 whereas the plaintiff's sub-division was transferred to him in 2010. There is, therefore, no way the defendant could have bought an "unregistered" portion of the same land in 2021.

23. The land registrar's evidence was to the effect that the suit property was not located in a settlement scheme as alleged by the defendant. The defendant did not produce any documents or letters from the department of land adjudication and settlement to demonstrate the existence of a settlement scheme in the area. The defendant did not call the vendor, Denis Barasa, to tender evidence on his behalf and maybe demonstrate the basis of his claim. In the event, the court finds and holds that the defendant has failed to demonstrate his counter-claim against the plaintiff. The court finds that Denis Barasa had no legal interest in the suit property which he could lawfully confer upon, or transfer to, the defendant.

c) Whether the plaintiff is entitled to the reliefs sought in the suit

24. The court has already found that the plaintiff has proved his claim against the defendant to the required standard. As

such, the plaintiff is entitled to some but not all the remedies sought in the plaint. The court has no hesitation in granting the 1st declaration on the plaintiff's ownership of the suit property. However, the court is not inclined to grant the 2nd declaration to the effect that the defendant has no legal interest in the suit property since it is unnecessary in view of the 1st declaration.

25. The court is also not inclined to grant the permanent prohibitory injunction sought by the plaintiff. The matter of which the plaintiff complained took place a long time ago. The wrongful entry and construction on the suit property took place as far back as 2021 or thereabouts. An order of injunction cannot legally undo what has already taken place. See *Mwakaki Investments Co. Ltd v David Gikaria & 3 Others* [2020] eKLR. The court is thus of the view that an eviction order would be a more appropriate and effectual remedy in removing the defendant from the suit property.
26. The court is of the opinion that the plaintiff's claim for mesne profits was neither pleaded with particularity nor adequately proved at the trial. The court is of the view that a claim for mesne profits is akin to a claim for special damages hence sufficient particulars thereof should be specifically pleaded

and evidence tendered on the alleged loss of income on the part of the plaintiff or the benefit which the defendant may have obtained on account of the wrongful occupation of property.

27. On the claim for general damages for trespass, the court is of the view that trespass is a tort which is actionable *per se*. The land owner is entitled to recover some damages without having to prove any specific loss as a result of the trespass. The law presumes such damage to a natural consequence of trespass.

28. In the case of *Kamoye vs Tipango & 2 Others (Environment & Land Case E011 of 2023) (2024) KEELC 4227 (KLR) (14 May 2024) (Judgment)* the award of general damages was considered as follows;

“17. On the issue of general damages for trespass, the issue that arises is the measure of it. In the case of Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR, it was held as follows:

*“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 after the trespass or the costs of restoration, whichever is less See *Hostler - VS - Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).*”*

18. In the case of Duncan Nderitu Ndegwa v KP & LC Limited & Another (2013) eKLR, P. Nyamweya, J held that: -

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass”

19. *From the evidence on record, there is nothing that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the plaintiff suffered for him to be compensated for the loss. However, in relying on the above authorities, I find the plaintiff has suffered damages as a result of the defendants’ unlawful acts of trespass and award him Kshs. 200,000/= as general damages.”*

29. Bearing in mind the size of the suit property and the period of continuous trespass, the court is of the opinion that an award of Kshs. 200,000 as general damages would adequately compensate the plaintiff for violation of his property rights.

d) **Whether the defendant is entitled to the reliefs sought in the counter-claim**

30. The court has already found that the defendant has failed to prove his counter-claim against the plaintiff. It would thus follow that the defendant is not entitled to the reliefs sought in the counter-claim, or any one of them.

d) **Who shall bear the costs of the suit and counter-claim**

31. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the *proviso* to *Section 27 of the Civil Procedure Act (Cap 21)*. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287*. The court finds no good reason to depart from the general rule. As a consequence, the plaintiff shall be awarded costs of both the suit and the counter-claim:

H. Conclusion and disposal orders

32. The upshot of the foregoing is that the court finds and holds that the plaintiff has proved his claim against the defendant on a balance of probabilities. The court also finds and holds that the defendant has failed to prove his counter-claim against the plaintiff to the required standard. As a result, the court makes the following orders for disposal of both the suit and counter-claim;

a. Judgment be and is hereby entered for the plaintiff against the defendant in the following terms only;

- i. A declaration be and is hereby made that the plaintiff is the legitimate registered proprietor of parcel No. 14490/I/MN (CR 49618).***
 - ii. The defendant is hereby granted a grace period of 60 days to vacate parcel No.14490/I/MN (CR. 49618) voluntarily in default of which he shall be forcibly evicted.***
 - iii. The plaintiff is hereby awarded general damages of Kshs. 200,000/= for trespass to land.***
- b. The defendant's counter-claim be and is hereby dismissed in its entirety.***
 - c. The plaintiff is hereby awarded costs of both the suit and the counter-claim.***

It is so ordered.

Judgment dated and signed at Mombasa and delivered virtually via Microsoft Teams on this 19th day of February, 2026.

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Y. M. ANGIMA
JUDGE

In the presence of:

Gillian - Court assistant

Mr. Orioki for the plaintiff

Mr. Tarmohamed for the defendant

ORIGINAL