

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELCLC NO. E012 OF 2025

MUTALA
.....**PLAINTIFF**

-VERSUS-

KAVENE KIVUVA**1ST**
DEFENDANT
KIOKO KIVUVA**2ND DEFENDANT**
NDANU KIVUVA**3RD**
DEFENDANT
KATUNGE KIVUVA**4TH DEFENDANT**

JUDGMENT

1. The Plaintiff filed the suit herein vide the Plaint dated 28th March, 2025 seeking the following reliefs against the Defendants: -
 - a) **An order directing the Respondent to implement the findings of the report of the Defendants to reflect the true and accurate boundaries in MAKUENI/KIOU/1679.**
 - b) **An order of permanent injunction restraining the Defendant whether by itself, agents, servants, employees or otherwise from subdividing, advertising as their own, sale, selling by public auction or private treaty, transferring, alienating or otherwise interfering with the Plaintiff’s right of ownership and or possession of MAKUENI/KIOU/1679 and the beacons placed within the boundaries of the property.**
 - c) **Damages for trespass.**
 - d) **Mesne profits interfering with a section of the property belonging to the Plaintiff.**
 - e) **Costs of the suit.**

f) Interest on the sum in (c),(d) and (e).

2. The Defendants did not enter appearance nor file their respective statements of defence despite service being effected upon them.
3. The matter proceeded to formal proof with the Plaintiff being the sole witness in support of his case.
4. PW1, Mutala Kyengo, duly adopted his statement dated 28th May, 2025 as his evidence in chief. He averred that he is the lawfully registered proprietor of land Parcel No. MAKUENI/KIOU/1679 (the suit property). He further averred that he purchased the suit property from the previous titleholder, Ndambuki Nzulua, in the year 2020. He added that he had been in peaceful possession of the suit property since the year 2020.
5. PW1 stated that in February, 2025 he invited the Defendants to the suit property with the intention of installing beacons on the suit property by a government surveyor. He averred that the government surveyor, the area Chief and neighbours were all chased away from the land by the Defendants and subsequent attempts to access the suit property have been hampered by the Defendants' agents. He added that the Defendants uprooted his plants, Kei apple fence and replaced the same with a chain-link fence.
6. PW1 averred that he is the genuine title-holder of the suit property and that the Defendants' actions are illegal and unsanctioned by this court. He filed a survey report dated 17th July, 2025 which he proceeded to produce alongside his bundle of documents in support of his case. He urged the court to issue the prayers sought in the plaint.
7. At the close of the Plaintiff's case, Counsel proposed to file written submissions. However, at the time of writing this judgment on 4th March, 2026, no submissions were on the record.

8. The sole issue for determination is whether the Plaintiff has demonstrated on a balance of probabilities that he is entitled to the orders sought in the Plaintiff.
9. The dictum of the court in **William Kabogo Gitau v George Thuo & 2 others [2010] eKLR** elaborates on what is proof on a balance of probabilities. The Court observed as follows: -

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case is more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%, as opposed to 49% of the opposing party, is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

10. The Plaintiff must demonstrate the extent of his entitlement to the orders sought even during a formal proof hearing. The Court of Appeal aptly affirmed this position in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR** as follows: -

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a 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 rebuttal by the other side.”

11. It is the Plaintiff's case that he is the registered owner of land Parcel No. MAKUENI/KIOU/1679. He claims that he has been prevented from accessing

the suit property by the Defendants who in addition to chasing him from the land, have also uprooted his plants. Kei apple fence and replaced the same with a chain-link fence.

12. It is not in dispute that the Plaintiff is the registered proprietor of LR No. MAKUENI/KIOU/1679 having purchased the land from Ndambuki Nzulua. He produced a copy of the title deed issued to him on 29th September, 2021 as PEX 1. He also produced copies of the application for consent of the Land Control Board-Mukaa, the letter of consent and transfer form dated 3rd August, 2021.
13. Again, the Plaintiff produced a copy of a survey report dated 17th July, 2025 that was done by the Sub-County Surveyor, Mukaa. It is clear that a boundary verification exercise of the suit property was conducted on 10th July, 2025 and that the Defendants being the immediate neighbours of the Plaintiff were invited for the exercise as per the letter dated 1st July, 2025 by the Sub-County Surveyor, Mukaa.
14. The survey report ascertained that the suit property measures 3.11 hectares whereas the neighbouring Parcel No. MAKUENI/KIOU/1678 belonging to the Defendants measures 1.07 hectares.
15. The court had directed a surveyor to visit the suit property and file a report. This followed an application dated 28th March, 2025 by the Plaintiff. The report which was prepared on 17th July, 2025 only indicated the acreage of the suit property and that of the 1st Defendant. There was a sketch attached to the report which showed the positioning of the suit property and parcel 1678 owned by the 1st Defendant. There was no mention in the report whether there was any encroachment of parcel 1678 on to the suit property.
16. There was also no mention whether there was any uprooting of fence or whether there was a new fence of chain link. The Plaintiff did not adduce any evidence of uprooting of his plants as claimed in the plaint.

17. Has the Plaintiff established a case of trespass to land against the Defendants?

Black's Law Dictionary (9th Edn) page 1643 defines trespass to land (*trespass quare clausum fregit*) as follows: -

A person's unlawful entry on another's land that is visibly enclosed. • This tort consists of doing any of the following without lawful justification: (1) entering upon land in the possession of another, (2) remaining on the land, or (3) placing or projecting any object upon it. 2. At common law, an action to recover damages resulting from another's unlawful entry on one's land that is visibly enclosed.

18. The Court of Appeal in Charles Ogejo Ochieng v Geoffrey Okumu [1995] eKLR held as follows: -

“Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. See Halsbury’s Laws of England 3rd edition Volume 38 at pg 744. In the instant case the appellant has no right to sue in trespass since the respondent was lawfully in possession of the title to the suit land at the time of the alleged trespass.

Moreover, under section 23 (1) of the Registration of Titles Act the certificate of title in respect of LR 8530/130 and in possession of the respondent shall be taken by all Courts as conclusive evidence that the respondent is the proprietor of the said land as the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.”

19. The Plaintiff's cause of action is founded on the allegation that the Defendants have trespassed into his land and prevented him from subsequent access thereto. He also claims that the Defendants uprooted his Kei apple live fence and installed a chain-link fence.

20. The Plaintiff bears the legal burden of proof for acts of trespass complained of. Section 107 (1) of the Evidence Act sets out as follows:-

(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.

21. The evidential burden is also cast upon the Plaintiff to prove any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Evidence Act which sets out thus: -

109. 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.

.....

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

22. Trespass is an issue of fact which must be supported with evidence. The Plaintiff did not avail proof of the alleged acts of trespass in the form of either a formal report by a government agricultural officer or a police investigation report. In the circumstances, a case of trespass to land has not been substantiated. As a result, the Plaintiff is not entitled to either an order of general damages for trespass or mesne profits.

23. The Plaintiff in his statement stated that he has been prevented from accessing his land. The surveyor who went to the ground stated in his report that the

Defendants were hostile during the visit on 10th July, 2025. As there is no contention that the Plaintiff is the registered owner of the suit property, he is entitled to quiet enjoyment of the same without any interference whatsoever from the Defendants. I therefore find that the Plaintiff has partially proved his case.

24. Consequently, I grant the following reliefs:

- a. An order of permeant injunction restraining the Defendant whether by themselves, agents servants, employees or otherwise from interfering with the Plaintiff’s right of ownership and possession of Makueni/Kiou/1679 and or interfering with the beacons marking the boundaries of the property.**
- b. The Plaintiff shall have costs of the suit.**

.....

HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 5TH DAY OF MARCH, 2026.

IN THE PRESENCE OF:

