



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CASE NO. E014 OF 2023

**ELIZABETH MBATHA KITUKU &
LUCY WAVINYA KITUKU (*suing as the administrators
of the Estate of the late Martin Sikuku Kutuku.....*
.....PLAINTIFF**

VERSUS

**WILLIAM OMOLE.....1ST
DEFENDANT**

**HUDSON KIBUSU MUSERA.....2ND
DEFENDANT
(*Sued as the office bearers of Hope Christian Community
Church*)**

JUDGMENT

1. In a lawsuit filed on August 28th, 2023, the plaintiff brought a case against the defendants, who serve as the office bearers of Hope Christian Community Church, registered under the Society's Act. He explained that his administrators are recognised as the owners of **L.R. No. 25383** (formerly known

as unsurveyed plot no. 62 and now called the “suit property”). The defendants allegedly trespassed onto this land illegally and without permission, interfering with the plaintiff’s administrator’s peaceful use of the property by constructing semi-permanent church structures and altering the beacons. As a result, the plaintiff is seeking the following reliefs from this court: -

- a) A declaration that the plaintiff is the bona fide proprietor of L.R. No. 25383 (formerly uns. plot no 62) and has the exclusive rights over the same.***
- b) A declaration that the defendants, whether by themselves or their agent, servants or anyone claiming under them, are illegal occupants of the suit property and therefore trespassers.***
- c) A declaration that the defendants' claim over L.R. No. 25383, or the original number unsurveyed plot. no 62, Athi River, is unlawful, and that any title documents or allotment obtained therefrom are null and void.***
- d) An order of eviction of the defendants, their agents and/or anyone claiming through them.***
- e) General damages against the defendants.***
- f) A permanent injunction against the defendants, whether by themselves or their agents or anyone claiming under them, from dealing, transferring, alienating, constructing, trespassing, interfering,***

charging, or encumbering, or in any other manner dealing with L.R No. 253 and/or unsurveyed plot No. 62, Athi River.

g) Costs of the suit and interest on the general damages at court rates.

h) Any other relief that the honourable court may deem just and fit to grant.

2. On service and from the record, the defendants, represented by the law firm of **Ms. SWAN Advocates**, submitted a notice of appointment dated 27/03/2025, which appears not to have been served on the plaintiff's counsel. Pointedly, this law firm did not file any pleadings in opposition to the suit. Consequently, the matter proceeded as an undefended case.

3. Ultimately, this case proceeded to a hearing on 6/10/2025, during which Elizabeth Mbatha Kituku (**PW1**), one of the plaintiff's legal representatives, testified. She relied on her oral testimony, the witness statement dated 28th August 2023, and documents produced and marked as **Pex. 1-10**.

4. Her case was that the plaintiff, who had since passed away, was her husband. He was allotted an unregistered plot in 1995, as shown by the allotment letter dated 24th February 1995 (**Pex. 2**). After receiving the allotment, he took all necessary steps to have the plot officially registered in his name, including paying the required fees and completing a survey

(Pex. 3, 4, and 5). Upon his demise, his legal representatives (her and her daughter) sought probate proceedings over his estate in **Machakos HCSC 604 of 2009**. This process resulted in a confirmation of a grant issued on 24th May 2011, with an order that the unsurveyed plot be registered in the names of the two administrators, for their own benefit and for the plaintiff's minor children.

5. Thereafter, the administrators moved forward with the titling process, which was completed with the issuance of a title document for the suit property on November 16th, 2021 **(Pex.6)**. They also settled the land rates payments **(Pex. 10)**. The defendants, as the registered owners of the church, as shown by the official search with the registrar of societies **(Pex. 7)**, entered the suit property without permission, as depicted in the collection of photos **(Pex. 10)**. The defence case was also closed.

6. Following the conclusion of the hearing, the plaintiff, through his law firm on record, **Ms. Maingi Musyimi & Associates Advocates**, filed written submissions dated 28th October 2025, wherein counsel delineated the composite issue of whether the plaintiff is entitled to the reliefs sought in the plaint. However, upon review of the entire case, this court identifies the issue for determination as **whether the plaintiff has proven his trespass claim** to the requisite standard. Accordingly, in its analysis and determination, the court will meticulously consider the arguments presented in these

submissions alongside the relevant legal principles and judicial precedents cited. But before proceeding further, it is necessary to mention that it is trite law that reliefs flow from pleadings, and in the circumstances, certain reliefs were not available to the plaintiff or his legal representatives.

7. Reverting to the issue for determination, it is essential to delineate the pertinent legal and jurisprudential framework on trespass. **Article 40** of the **Constitution** recognises that every person has the right to acquire and own property of any kind and in any location within Kenya. The protections and limitations related to such land rights are governed by **Sections 24, 25, and 26** of the **Land Registration Act**, which demarcate land rights, privileges, appurtenances, liabilities, and interests. Other relevant provisions of the law are contained in the **Land Act** and the **Trespass Act**, which specifically stipulate:

Section 152A of the **Land Act 2016** states as follows: -

“A person shall not unlawfully occupy Private, Community or Public Land.”

Section 3 (1) of the **Trespass Act** defines trespass as: -

“any person who without unreasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock

or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.”

8. As for the writings of eminent scholars, the text of **Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923**, defines trespass to land as follows: -

“Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.”

Page 927 of the same text discourses as to 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.”

9. In the book of **Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition, page 428**, trespass is discussed as follows:

“Trespass to land, like the tort of trespass to goods, consists of interference with possession.

Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.”

10. The prevailing theme in the definition of trespass, as articulated by these esteemed scholars, is that ownership is not a prerequisite for such a claim. Nevertheless, the assertion of a person holding title to the land takes precedence in cases of competing claims of possession. In the instant case, the plaintiff's claim of ownership was uncontested by the other defendants. Still, the evidential burden rests with the plaintiff, as the person alleging, to prove his claim, as provided by **Sections 107** and **109** of the **Evidence Act**. The plaintiff needed to prove his claim either by demonstrating that the suit property was registered in his name or in that of his legal administrators, or by showing that he had taken possession before the defendants' entry, as trespass claims are usually based on possession. He or his administrators were also

required to show that the defendants occupied the suit properties without their permission.

11. In this instance, PW1's testimony was credible, unchallenged, and corroborated by documentary evidence, which showed that the plaintiff was allocated the unsurveyed plot. This implies that, at the time of allocation, the land was unalienated government property. The court-issued certificate of confirmation grant, along with the certificate of title, confirms that the plaintiff's administrators are the lawful registered owners of the suit property.
12. PW1 submitted evidence demonstrating that the defendants had entered the suit property and installed a water tank, a temporary tent structure, and a tin (*mabati*) structure within the suit property. She also presented a copy of a photograph of a concrete structure; however, this court finds it unreliable because it is incomplete. She also failed to lead evidence on the issue of the defendants' alteration of beacons, or to substantiate it, and therefore, this court finds that, to this extent, she also did not prove this limb of the averment.
13. She also failed to disclose the defendants' alleged date of entry; nonetheless, in the absence of a disclosed date of entry by the defendants, this court has taken that their date of entry onto the suit property was 12/02/2015, corresponding to the date of registration, which this court finds was without the

plaintiff's or his representatives' permission and also finds that their actions constituted trespass.

14. It is well established that trespass is an actionable offence *per se*, without the need to prove actual damage. Considering the duration of the trespass, the size of the affected property, which PW1 described as a small portion, the location, and the nature of the trespass, the court hereby awards the plaintiff Kshs 500,000/- as general damages. In the end, the following final orders are hereby issued: -

a) A declaration is hereby made that the plaintiff is the bona fide proprietor of L.R. No. 25383 (Grant no. 252432) located within Mavoko Municipality in Machakos District and has the exclusive rights over the same.

b) A declaration is hereby made that the defendants, whether by themselves or their agent, servants or anyone claiming under them, are illegal occupants and trespassers over L.R. No. 25383 (Grant no. 252432) located within Mavoko Municipality in Machakos District.

c) A permanent injunction is hereby issued against the defendants, whether by themselves or their agents or anyone claiming under them, from dealing, transferring, alienating, constructing, trespassing, interfering, charging, or encumbering, or in any other manner dealing

- with L.R. No. 25383 (Grant no. 252432) located within Mavoko Municipality in Machakos District.***
- d) An order is hereby made that the defendants, by themselves, their servants and/or agents or any other parties claiming under or through them on L.R. No. 25383 (Grant no. 252432) located within Mavoko Municipality in Machakos District, do vacate it and, at their own cost and remove any developments therein within 90 days hereof and give the plaintiff vacant possession, and in default, the plaintiff shall forcefully evict them together with their servants or agents.***
- e) The plaintiff is awarded general damages of Kshs. 500, 000/=, which the defendants shall bear.***
- f) The defendants shall bear the plaintiff's costs of the suit.***

Judgment accordingly.

Delivered and Dated at Machakos this 3rd day of March, 2026.

**HON. A. Y. KOROSS
JUDGE
03.03.2026**

**Judgment delivered virtually through Microsoft Teams
Video Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant.

Mr. Maingi for plaintiff.

Mr. Mwinzi coming on record for 1st and 2nd defendants.

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