

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC CASE NO. E019 OF 2024

LAKE BASIN DEVELOPMENT AUTHORITY.....
PLAINTIFF

VERSUS

LAKE AGRO
LIMITED.....DEFENDANT

JUDGEMENT

1. The Plaintiff Lake Basin Development Authority vide a plaint dated 6th August 2024 brought this suit against the Defendant Lake Agro Limited seeking the following reliefs;-
 - a) A declaration that the Defendant is a trespasser on the suit property;
 - b) An eviction order and permanent injunction restraining the Defendant, its employees and/or agents from entering upon, taking possession of, trespassing on, alienating or interfering with by any other means howsoever, the suit property;
 - c) Damages for Trespass and Mesne Profits for wrongful possession of the suit property.
 - d) The costs of this suit with interest thereon.

2. It is the Plaintiffs case that it is the registered proprietor of all that land parcel known as Land Title Number Siaya/Kadenge/899 measuring 15.12 Ha together with buildings and structures. Particulars of the Buildings and structures are set out at paragraph 3 of the plaint.
3. That in the year 2003, the Plaintiff and Dominion Farms Limited entered into a Memorandum of Understanding (MOU) for inter alia lease of the suit property. That Dominion Farms Limited took possession of the suit property, however and pursuant to clause EE1 and 2 of the MOU no lease and or tenancy agreement was entered into between itself and the Plaintiff.
4. The Plaintiff avers that vide Kenya Gazette Notice No. 350 of 2020, [Volume CXXII] dated the 13th day of January, 2020 the Defendant took over the possession and occupation of the business carried on the suit property from Dominion Farms Limited under the guise of transfer of business.
5. The Plaintiff then instructed its advocate to institute on its behalf Kisumu High Court Civil Suit No. 1 of 2020 Lake Basin Development Authority vs. Dominion Farms Limited & Another (herein Kisumu High Court Suit") on the 3rd day of February, 2020 seeking to stay the said transfer of business and the same is yet to be determined.
6. It is also averred that in furtherance to the foregoing and in the Kisumu High Court Suit the Plaintiff filed an application dated the 4th day of August, 2020 seeking

vacant possession of the demised premises however, the said Application was struck out for want of jurisdiction as the Honourable Judge noted that the Environment and Land Court was the right forum to determine the Application vide its ruling of the 30th day of March, 2023.

7. The Plaintiff avers that vide a letter dated 17th April, 2020 it addressed the Defendant's Advocates undertaking the said transfer of business seeking to clarify as to whether the Defendant would continue to occupy the suit property and negotiation of fresh lease upon successful transfer thereto but no response was received.
8. That therefore the Defendant's occupation of the suit property has not been subject to any lease and/or tenancy agreement and thus amounts to trespass, continues to cause the Plaintiff rental income loss and wastage of the said property.
9. That the Defendant has without its consent and/or knowledge and/or authority and/or without any color of right whatsoever entered into the suit property, purported to take possession thereof and put to its commercial use the buildings and structures for its own benefit and exclusion of the Plaintiff.
10. The Defendant entered appearance and filed its Statement of Defence dated the 9th day of October, 2024 denying Plaintiff's ownership of the suit property and/or of any of the buildings and/or structures therein.

11. The Defendant admitted that a notice was issued pursuant to the provisions of the Transfer of Business Act as pleaded concerning a transaction between the Defendant and Dominion Farms Limited but denied that it took over possession of the Plaintiff's property from Dominion Farms Limited.
12. The Defendant further avers that it is the proprietor of premises known as Title Number:Usonga/Usonga Block 1/7, Title Number: Usonga/Usonga Block 1/8 and Title Number: Usonga/Usonga Block 1/4 together with all the buildings and improvements thereon which properties are in the vicinity of the Suit Property and which properties they rightfully occupy and not the Plaintiffs property.
13. The Defendant denied the rest of the contents of the Defence except the descriptive parts and aver there is no trespass to property on their part. According to the Defendant there is no basis whatsoever for any purported lease and/or tenancy agreement to be entered into between the parties and the Defendant and deny any loss of rental income and/or wastage of the subject property as alleged or at all.
14. The jurisdiction of this Court is however admitted.
15. The Plaintiff filed a further reply to the Defence dated 14th January 2025 reiterating the averments in the Plaint and denied all the contents of the Defence.

Hearing and Evidence

16. The matter proceeded for hearing on 21st April, 2022. The Plaintiff called Michael Okello Okuk its Deputy Director Legal Services as PW1. PW1 adopted his witness statement dated 12th March 2025, as his evidence in chief and produced the documents filed on even date as PEx 1-22. Item 22 on the list was marked for identification. The witness statement largely reiterated the averments in the Plaintiff.
17. It was his further evidence according to the witness statement that as part of the terms of the MoU and more specifically Clause DD of the MoU and Clause CC4, Dominion Farms Limited was to pay to the Plaintiff consideration for provision of technical assistance and expertise that Dominion would require from time to time commencing in 2003. The terms are given in the witness statement ranging from 0-5 years up to 25 years with the rent's escalation.
18. That pursuant to Clause EE 2 of the MoU, the Defendant and Dominion agreed to enter into a tenancy agreement for the houses and offices erected on the suit property. Dominion Farms Limited made payments of annual rent to the Plaintiff in consideration of provision of technical assistance.
19. According to the witness statement it is the Plaintiffs case that in compliance with the MoU, the parties engaged the services of a surveyor for purposes of demarcation of the suit property to be leased however no lease was entered.

20. The witness statement also outlined the history of litigation surrounding the parties and their outcome.
21. On cross examination PW1 stated that the Plaintiff did not have a lease with Dominion, that part of the land is occupied by the Defendant as evidenced by Report and Valuation (produced as PEx 22), the demand letter dated 17/4/2020 was prompted by the occupation though not addressed to the Defendant, he had no evidence to prove they were denied access. The witness emphasised in re-examination that the MOU was signed and which indicated Dominion would sign a lease.
22. PW2 was Kenneth Omondi Otumba. He produced the Report & Valuation by LEO REALTORS LTD dated 15/10/2024 (PEx 22). It was his evidence that he visited the property for purposes of the valuation on 8/10/2024. The report gave market value of the property, rental value and rental income. Counsel for the Defendant had no questions in cross examination.
23. With the above the Plaintiffs case was marked as closed.
24. The Defendant did not call any witnesses and its case was marked as closed.

Submissions

25. The Plaintiff filed submissions on the 20th September, 2024. Counsel submitted on three issues namely 1)whether the Plaintiff is the registered proprietor of the parcel Siaya/Kadenge/899; 2)whether the Defendants

Occupation amount to trespass; and 3) whether the Plaintiff is entitled to the reliefs sought and who should bear the costs of this suit.

26. Counsel for the Defendant did not file submissions.

ANALYSIS AND DETERMINATION

27. Having carefully considered the pleadings, testimonies and submissions herein and the history of the matter the issues that arise for determination are; -

- 1) Whether the Plaintiff is the lawful owner of the suit property;
- 2) Whether the Defendants are trespassers on the suit property;
- 3) Whether the Plaintiff is entitled to the reliefs sought in its plaint
- 4) Who bears the Costs of this suit.

28. My understanding of the Plaintiffs claim is that it seeks that the Defendant is declared a trespasser on parcel Title Number Siaya/Kadenge/899 belonging to the Plaintiff and is evicted therefrom having entered the same unlawfully without its consent sometime in the year 2020 after taking over the business of Dominion Farms Ltd. That efforts to pursue the Defendant to regularise their occupation between the Plaintiff and the Defendant were met with silence. As it is there are no formal lease arrangements or tenancy agreement between the parties.

29. The Defendant on the other hand contends that they are in occupation of a separate piece of land adjoining the Defendants and there is no basis for them to enter into any leasing or renting arrangements neither are they trespassers. They also deny that parcel Title Number Siaya/Kadenge/899 belongs to the Plaintiff.

30. The Defendant did not call any witness but their counsel participated in the hearing by cross examining the witnesses who testified in support of the Plaintiffs case. This then takes me to the question of the burden of proof in civil cases.

31. Section 107 of the Evidence Act Cap 80 of the Laws of Kenya provides 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

32. Sections 109 and 112 of the same Act states as follows:

“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.”

33. The Court of Appeal in **Mumbi M'Nabea vs David M. Wachira [2016] eKLR** had this to state regarding the standard of proof in civil liability claims Kenya; -

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the [Evidence Act](#), (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular

fact may be cast on the person who wishes the Court to believe in its existence.”

34. The question then is whether the threshold will be lowered where no evidence is called by the other party or say where the suit is largely undefended. In this regard I will be guided by the persuasive dictum in the case of **Susan Mumbi Versus Kefala Grebedhin; (Nairobi HCC NO. 332 OF 1993)** where Justice J. V. Juma had this to say; -

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.”

Whether the Plaintiff is the lawful owner of the suit property;

35. The Plaintiff claim is that it is the legal owner of the Land Title Number Siaya/Kadenge/899 measuring 15.12 Ha together with buildings and structures thereon. In the circumstances, the Plaintiff had a duty to tender evidence before this Court to prove the claim. PW1 produced in its list of documents dated 12/3/2025 Copy of Title Deed for Siaya/Kadenge/899 and Copy of Green Card for the same. My perusal of the same reveal that Lake Basin Authority was registered as the proprietor on 4/12/2019 and title issued on the same day. The green card further reveals

that the previous owner to be Siaya County Council but reserced for

36. Section 24 (1) of the Land Registration Act is on interest conferred by registration and reads;-

Subject to this Act

(a) 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; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

37. Section 26 of the Land Registration Act provides

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.
38. The Defendant has challenged this ownership in the Defence but the basis upon which the same is challenged is not clear. No evidence has been led to prove that the Plaintiff is not the owner of the parcel Siaya/Kadenge/899 or that the title was acquired irregularly or fraudulently.
39. The Court in the case of **Margaret Njeri Wachira Vs. Eliud Waweru Njenga (2018)eKLR** - discussing the legal implication of sec 24, 25 and 26 of the Land Registration Act stated;-
- 10. The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. In the present case the title produced by the Plaintiff shows that the suit land is registered in her name. That position was not challenged by the Defendant in fact the Defendant failed to file any pleadings in opposition to the claim either in person or through his counsel on record'*
40. Having considered the Plaintiff's evidence and specifically the title deed (exhibited as the Plaintiff's Exhibit 1), this Court, in accordance with the law above will treat the title for Siaya/Kadenge/899 as conclusive proof that the

Plaintiff is the absolute and indefeasible owner of the suit property.

41. The plaintiff therefore has a right to quiet and peaceful possession of his property as envisaged under article 40 of the Constitution of Kenya. The above finding then paves way for the discussion whether the Defendants occupation of the parcel Siaya/Kadenge/899 amounts to trespass.

Whether the Defendants are trespassers on the suit property;

42. A discussion on the law of trespass its definition and what constitutes trespass is relevant at this juncture.
43. The legal framework on the law on trespass is the Trespass Act Cap 34 of the Laws of Kenya. Section 3 provides

Trespass upon private land

(1) Any person who without reasonable 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.

44. The Act defines an 'occupier' as the owner or the person lawfully in occupation of private land, any manager or agent of such person and, in respect of forest areas and railway land, the Chief Conservator of Forests and the Managing Director of Kenya Railways respectively.

45. As to “private land” the Act states it means land which is owned or occupied by any person by virtue of a freehold title, a certificate of ownership or a lease; or land in respect of which a claim to an estate in fee, or to a lease, has been made but disallowed or refused; or cultivated land or enclosed land; or any forest area; or railway land.

46. According to the **10th Edition of Black’s Law Dictionary** trespass is defined as follows;

“an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason”.

47. Court of Appeal in **Charles Ogejo Ochieng v Geoffrey Okumu [1995] eKLR**, the learned judges took a view that

“Trespass is an injury to the possessory right, and therefore the proper Plaintiff in an action for trespass to land is the person who has title to it, or a person who is deemed to have possession at the time of the trespass.”

48. The next hurdle for the Plaintiff to surmount was to prove the occupation by the Defendant and that it was without its permission or entry. PW1 testimony is that the Defendants have been in possession of the suit property since the year 2020 when they took over the business of Dominion Farm Limited pursuant to the Gazette Notice No. 350 of 2020 (Volume CXXII). A copy of the Notice was produced as item 16 of the Plaintiffs list of documents (PEx16).
49. I have looked at the Gazette Notice and the same is conclusive that the Business of Dominion Farms Ltd was being transferred to Lake Agro Limited who is the Defendant herein. Further that the said transferee was going to continue the business on the same premises/land. While PW1 evidence in chief was that the Plaintiff filed a suit to stop the business takeover, there is no evidence on record that the same was stopped. This court can therefore safely infer that the take over happened and infact this appears to be the plaintiffs case. PW1 gave a history linking itself to Dominion Farms Limited having pursuant to an MoU authorised them to occupy the land. The Mou was produced in evidence.
50. I have also seen a letter dated 17/04/2020 from the Plaintiff which points to the need to mitigate delay of the transfer of Dominions business to Lake Agro Limited noting that the continued operation of the farm is beneficial to all stakeholders. PW1 also produced the letter

dated 5/07/2024 also indicating the Defendant was in occupation of the suit premises after takeover of the business. The letter also issues a notice to vacate. This connotes on a balance of probabilities that the Defendant was in occupation of the plaintiffs land without their permission. Even after the notice no evidence was placed before court indicating that the Defendants sought consent to continue remaining on the land.

51. Moreover, PW1 evidence that when Dominion left the Defendant took over, was never controverted by the Defendant. It is also noteworthy that on 3/03/2025 the record bears that this court engaged the counsels on record on the application dated 6/08/2024 and orders of status quo were agreed by consent of the parties that the Defendant was on the suit property pursuant to the Gazette Notice herein.
52. Based on the foregoing it is clear that the Defendants were not put in possession by the true owner of the property and even after notice they never sought the owners permission to be on the premises but have continued to occupy the same on the guise of the Gazette Notice. Moreover, to the extent that the Plaintiff is the owner of the suit parcel herein, trespass in this context is the violation to the right to ownership.
53. I find no hesitation to make a finding that the Defendant occupation of the suit property amounts to trespass.

Whether the Plaintiff is entitled to the reliefs sought in its plaint

54. The orders sought by the Plaintiff have already been outlined elsewhere in this judgement. It is the Plaintiff's case that the Defendants occupation since the take over in the year 2020 has caused the Plaintiff losses and damage. The Plaintiff craves interalia General Damages for Trespass and Mesne Profits for wrongful possession of the suit property.

55. It is trite that trespass is actionable *per se*. In **Park Towers Ltd. v. John Mithamo Njika and 7 Others 2014 eKLR**, the court had this to say; -

'I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.'

56. In **Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] KECA 536 (KLR)** the Court of Appeal stated thus;-

' In tort damages are awarded as a way to compensate a party for the loss he or she had incurred due to a wrongful action on the part of the other party. The damages so awarded are intended

to return the party back to the position he or she was in before the wrongful act was committed. **Halsbury's Laws of England 4th Edition Volume 45 para 26 1503** provides as follows on computation of damages in an action for trespass:

a)If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.

b)If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

c)Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.

d)Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.

e)If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased.”

57. Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows:

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

58. Order 21 Rule 13 of the Civil Procedure Rules provides as follows:

13. (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of such suit until—

(i) the delivery of possession to the decree-holder;

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

59. In the case of **Karanja Mbugua & another v Marybin Holding Co. Ltd [2014] eKLR** the court stated as follows with regard to mesne profits:-

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of Civil Procedure Act. The said provisions state as follows with regard to a decree for possession and mesne profits:.....

(2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

60. I have already noted that a claim of mesne profits has been pleaded. PW2 produced a Report & valuation of Title Siaya/Kadenge/899 by Leo Realtors Limited which survey he undertook on behalf of the Plaintiff. One of the terms of reference as seen in clause 1.0 was to assess rental value of the buildings. The rental value of the buildings is given as Kshs. 5,940,000.00/ per annum translating to Kshs. 495,000.00 per month. Rental value of the whole property is assessed at Kshs. 7, 200,000.00/- per annum. This report was not controverted. Infact Counsel for the defendant had no questions in cross examination for PW2.

61. Additionally, evidence was produced of the existing arrangements between the Plaintiff and Dominion wherein Dominion was not in free occupation of the suit property and had actually made some deposit for rent.

62. It is the finding of this court that the Plaintiff has proved the claim for mesne profits to the required standard and the same is payable.
63. On the claim for general damages, the Court of Appeal in **Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees (supra)** stated thus; -
- 'It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both'*
64. Arising from the above the court is guided and the prayer for general damages is thus declined.
65. The Plaintiff has also sought an order of eviction and permanent injunction restraining the Defendant, its employees and/or agents from entering upon, taking possession of, trespassing on, alienating or interfering with by any other means howsoever, the suit property.
66. Among the rights to be enjoyed by a registered owner of any land is the right for peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to the land has a right to possession, occupation and use of the suit land. The Plaintiff led evidence that shows that the Defendant has illegally taken possession of the suit land and is utilizing it for his own benefit. These actions of the Defendant amount to violation of the Plaintiffs right as guaranteed in the constitution and must be stopped. The Defendant has no right to remain on the suit property.

67. The court however notes that the Plaintiff has always been desirous that the Defendant would regularise their stay on the suit property but this has never yielded any positive outcome. Indeed, the Plaintiff had recognised the continued operation of the farm is beneficial to all stakeholders. It is my considered opinion that pursuant to article 159(2) (c) of the Constitution of Kenya 2010 this is still a matter that can be pursued at the pleasure of the Plaintiff and with the consent of both parties.
68. The upshot of the foregoing is that it is the finding of this court that the Plaintiff has proved its case to the required standard and judgement is hereby entered for the Plaintiff against the Defendant in the following terms; -
- 1) A declaration that the Defendant is a trespasser on the suit property Siaya/Kadenge/899
 - 2) The Defendant its employees and/or agents and whomsoever claiming under the Defendant to vacate the property Siaya/Kadenge/899 within 180 days of this judgement and in default eviction to issue in accordance to the provisions of the law.
 - 3) Damages for Mesne profits is awarded at Kshs. Kshs. 7, 200,000.00/- per annum from April 2020 to the date of this judgement together with interest at court rates payable within 180 days.
 - 4) An order of permanent injunction hereby issues restraining the Defendant, its employees and/or agents from entering upon, taking possession of,

trespassing on, alienating or interfering with by any other means howsoever, the parcel Siaya/Kadenge/899.

- 5) That in the event the Defendant wishes to enter into negotiations for a lease it is at liberty to do so and at the option and will of the Plaintiff and file terms of settlement within 180 days of this judgement. Provided that the full judgement of the court shall come into effect upon the expiry of the said period without further reference to this court.
- 6) Section 27 of the Civil Procedure Act is to the effect that costs follow the event the same are awarded to the Plaintiff.

Orders accordingly.

Dated at Siaya this 5th Day of March 2026

HON. JUSTICE A. E. DENA

JUDGE

5/03/2026

**Judgement delivered virtually through Microsoft Teams
Video Conferencing Platform in the Presence of:**

Mr. Oboor Holding Brief for Mr. Ogejo for the Plaintiff

Mr. Ratika Holding Brief for Mr. Wachira for the Defendant

Court assistant: Ishmael Orwa

ORIGINAL