

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ELCEPC NO. E001 OF 2023**

DAVID MALILI MBUTO MWILU .....  
.....PLAINTIFF

-VERSUS-

NGEI MUASYA .....  
DEFENDANT

**JUDGMENT**

1. By plaint dated 23<sup>rd</sup> October, 2023, the Plaintiff sought the following reliefs against the Defendant.

a. **A permanent injunction to restrain the Defendant, either by himself, his agents, surrogates, servants or any person claiming under or through him from entering into, trespassing, cultivating, tilling, destroying vegetation, cutting down trees, burning charcoal or in any other manner interfering with title number Makueni/Kai “A”/137.**

b. **An order of eviction of the Defendant, his agents, surrogates, servants or any person claiming under or through him from title Makueni/Kai “A”/137 and further that the eviction be supervised by the officer commanding station of the police within whose jurisdiction the suit property lies.**

c. **General damages for trespass.**

d. **Any such other or further relief as this honourable court may deem fit and just to grant.**

2. The Plaintiff testified that he is the administrator of the estate of his late father Samson Mwilu Mulili (deceased) who died on 25<sup>th</sup> August, 2017. The deceased purchased a portion measuring 10.75 hectares from the

- Defendant's father. The land was registered in the deceased name 11<sup>th</sup> April, 2011 and a title issued on 28<sup>th</sup> November, 2014 under Makueni/Kai "A"/137.
3. The Plaintiff undertook succession proceedings in respect of the estate of the deceased. He obtained a certificate of confirmation on 15<sup>th</sup> July, 2021 wherein the suit property was registered in his name by way of transmission. He obtained title in his name on 21<sup>st</sup> December, 2021.
  4. The Defendant trespassed on to the suit property and started cutting down trees burning charcoal, tilling thereon, grazing his animals and committing other acts of wanton destruction. In September, 2023, he caused a demand letter to be written to the Defendant asking the Defendant to desist from the trespass but he has failed to do so.
  5. The Defendant stated that he is son of Muasya Mbaluku who owns parcel number Makueni/Kai "A"/138. The Defendant who is acting in person had filed an undated witness statement on 23<sup>rd</sup> November, 2023. He stated that his father who was a retired assistant chief had given him the land in issue as compensation for injury caused to him by his brother's wife.
  6. The Defendant denied trespassing into the suit property. He stated that he was not the one who was committing the alleged acts of trespass. He stated that it was the sons of Ndiku who were trespassing into the suit property and committing the acts of trespass attributed to him.
  7. The Defendant challenged the Plaintiff to produce a sale agreement which his father entered into with the Plaintiff's father. The Defendant stated that the Plaintiff has been causing his arrest but he has never been charged. He challenged him to produce an agreement which had been recorded in a book which at some stage was produced before assistant chiefs Muthondwe and John Mukumbu.
  8. In his oral testimony in court on 9<sup>th</sup> October, 2025, the Defendant stated that when his father fell sick in 1991 and 1992. He had no money to pay for his treatment. The family approached Mwalimu Makonge Mbulu who gave

them Kshs.1,000. He later gave them another Kshs.1,500/=. The Defendant stated that he overheard his father tell Makonge that he had sold to him 10 acres. He stated that the Plaintiff's claim to 26 acres is not valid and has no basis.

9. He stated that when the Plaintiff started claiming that his father had purchased 26 acres, his mother was so infuriated that she went and committed suicide by throwing herself on the road where she was overran by a vehicle killing her instantly.

10. The parties were directed to file written submissions. The Plaintiff filed his submissions dated 6<sup>th</sup> November, 2025. The Defendant did not file any submissions. The Plaintiff submitted that he had discharged the burden of proof bestowed upon him under sections 107 and 109 of the Evidence Act. He submitted that the Defendant had admitted that he had sold part of the suit property which goes on to confirm that he is ready to proceed with his acts of trespass.

11. The Plaintiff relied on the case of **Bianca Kabura Mwangi –vs- James Kinuthia Mwangi (2013) KLR** where it was held as follows:

**“Section 25 (Land Registration Act) protects the rights of a proprietor and that the same are not liable to be defeated except as provided by the Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interests and claiming whatsoever but subject to the leases charges and other encumbrances and to the condition and restriction if any show in the register and to such liabilities and interest as affect the same and are declared by Section 28 not to require nothing on the register unless the contrary is exposed in the register.”**

**In Dr. Joseph Arap Ngok –vs- Justice Moiyo Ole Keiuwa & 5 others, Civil Application No. 60 of 1997 (Nairobi) the court delivered itself thus:- “Section 23 (1) of the then registration of Titles Act (now**

reproduced substantially as Section 25 and 26 of the Land Registration Act) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misinterpretation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.

12. I have carefully considered the evidence adduced by the Plaintiff as well as that of the Defendant. I have also considered the submissions by the Plaintiff. The following are issues for determination. Firstly, whether the Plaintiff has proved trespass by the Defendant. Secondly, whether the Plaintiff’s father purchased 10 acres or 10.75 hectares.

13. On the first issue, the Plaintiff’s contention is that the Defendant has trespassed on to the suit property and is grazing animals thereon, burning charcoal, cutting down trees and clearing vegetation. He further states that the Defendant has prevented him from accessing the suit property.

14. The Plaintiff’s suit is founded on allegation that the Defendant has trespassed on to the suit property. The burden of proving those allegations lay on the Plaintiff. Section 107 (1) of the Evidence Act provides as follows:

**“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”.**

15. Further Section 109 of the Same Act states as follows:

**“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”.**

16. **Black's Law Dictionary (9<sup>th</sup> edition) 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.*

17. 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.”*

18. The Plaintiff did not adduce any evidence to show that his tress had been cut down or that there was burning of charcoal or clearance of vegetation. The Defendant denied that he is the one committing the alleged acts of trespass. He stated that it is the sons of Ndiku who were doing so.

19. During the hearing and particularly during cross examination, the Plaintiff admitted that there were no boundaries marking the suit property. There was an attempt to take a surveyor to the ground to ascertain the boundaries of the suit property but this did not work as the Defendant became hostile.
20. The evidence which came out is that the Defendant's father had over 300 acres. As there was no survey report produced to determine the boundaries of the suit property and that of the Defendant's father, one cannot make a finding that there is trespass on the part of the Defendant.
21. The Plaintiff did not plead that part of his land had been sold by the Defendant. This came in submissions and submissions are not evidence. The alleged admission by the Defendant that he sold part of the suit property came while under cross examination but he insisted that he was not aware of the 26 acres being claimed. He only admitted that he is only aware of sale of 10 acres and not 10.75 hectares.
22. On the second issue there was challenge to the title held by the Plaintiff. The law is clear that where the root title of a property is being challenged, it is not enough for him to dangle the instrument of title. He must prove that the title was acquired in a proper way. See the case of **Munyu Maina –vs- Hiram Githia Maina** where it was stated as follows:
- “We have stated that when a registered proprietor root to title is challenged, it is not sufficient to dangle the instruments of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register”.**

23. See also the case of **Dina Management Limited –vs- County Government of Mombasa & 5 others (Petition E010 of 2021)** where it was held as follows:

**“110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the Appellant.**

**111. Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the Appellant thereafter cannot be protected under Article 40 of the Constitution. The root of the title having been challenged, as we already noted above the Appellant could not benefit from the doctrine of bonafide purchaser.**

**112. We therefore agree with the Appellate court that the Appellant’s title is not protected under Article 40 of the Constitution and the land automatically vests to the 1<sup>st</sup> Respondent pursuant to Article 62 (2) of the Constitution. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The Appellant ought to have been more cautious in undertaking its due diligence”.**

24. The Plaintiff while being cross examined by the Defendant stated that he had the original agreement which he did not produce. The Plaintiff was aware that the Defendant was contending that his father purchased 10 acres and not

10.75 hectares. The Defendant also did not know how the Plaintiff's father obtained title.

25.As the root of title was being challenged, it was upon the Plaintiff to show that he had a sale agreement, consent of the land control board was obtained, proper subdivision was done and title to the suit property ultimately came into being.

26.As the Plaintiff has neither proved that his father obtained a genuine title nor any trespass, I find that he has failed to prove his case on a balance of probabilities. I proceed to dismiss the Plaintiff's case with costs to the Defendant.

.....

**HON. E. O. OBAGA**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 5<sup>TH</sup> DAY OF MARCH, 2026.**

**IN THE PRESENCE OF:**

Mr. Sila for Mr. Ngolya for Plaintiff.

Defendant in person.

Court assistants – Steve & Nyaanga