

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC NO. 54 [E049] OF 2021**

**CATHERINE ORONDO ATABO**

*(Suing as the Legal Representative of the Estate of the late*

**SARAH**

**ATAMBO**

**ESIRON)-----PLAINTIFF**

**VERSUS**

**THE LAND REGISTRAR-**

**KITALE-----DEFENDANT**

**PROF. BEN WAFULA WANJALA-----**

**DEFENDANT**

**JUDGMENT**

1. The plaintiff brings this suit in her capacity as the daughter and the legal representative of the estate of her late mother, **Sarah Atambo Esiron**, who was the registered owner of land title No. **Kitale Municipality Block 16/Kaura Wa Bechau/74** measuring **3.175 Ha**, hereinafter the suit property. She avers that her late mother, on **15/10/1990**, sold only **2** acres of her land to the 2<sup>nd</sup> defendant, which were to be hived off from the original land title No. **Kitale Municipality Block 16/Kaura Wa**

**Bechau/74**, and was later transferred as **Kitale Municipality Block 16/Kaura Wa Bechau/75** on **6/2/1998**.

2. The plaintiff avers that on **11/11/1998**, she discovered that the 2<sup>nd</sup> defendant, instead of taking the **2** acres on the ground, had illegally and forcefully fenced off and occupied more hectares of the suit property, without permission from her mother, to which she wrote a letter to the 1<sup>st</sup> defendant for intervention, in view of the encroachment of her land by the 2<sup>nd</sup> defendant.
3. The plaintiff avers that despite the notice to vacate, the 2<sup>nd</sup> defendant instead frustrated her by blocking her access to the land next to the riverbank on **31/7/2004**. The plaintiff avers that, on **12/10/2016**, she discovered that the 2<sup>nd</sup> defendant had unjustifiably registered a caveat/caution over the suit property's register on **4/6/2010**, which, despite written protestation, the 1<sup>st</sup> and 2<sup>nd</sup> defendant have refused to lift or remove.
4. The plaintiff avers that as a result of the encroachment and the illegal caveat, she is unable to access, use, farm, and or utilise the encroached portion. The plaintiff prays for:

- (a) An order for a survey of the portion owned by the plaintiff and registered as Kitale Municipality Block 16/Kaura Wa Bechau/74, to determine the actual mutation as per the existing survey and mutation drawing on the ground, and the level of encroachment and the illegal takeover and or grabbing of more hectares committed by the 2<sup>nd</sup> defendant.**
- (b) Order that the illegal encroachment, takeover, grabbing, and boundary walls and fence, as erected on more hectares of title No. Kitale Municipality Block 16/Kaura Wa Bechau/74 is illegal and unlawful.**
- (c) Declaration that the encroached and or grabbed land of more acres on the suit property belongs to the estate.**
- (d) An order compelling the 1<sup>st</sup> defendant to rectify the register of any entry invalidating the purported caution on the title to the suit property placed on the register by the 2<sup>nd</sup> defendant on 4/6/2010.**
- (e) Permanent injunction restraining the 2<sup>nd</sup> defendant, his agents, servants, or assignees from interfering with the plaintiff's quiet possession, use, occupation, and enjoyment of the suit property; from trespassing, or in any way dealing with her land, and an order compelling them to vacate her land, failure to which he be forcefully evicted from the suit property.**
- (f) General and exemplary damages as compensation for the trespass and the illegal activities thereon, with effect from 4/6/2004 to date.**

**(g) Order that the OCPD Kitale and DCIO Kiminini ensure compliance with the orders granted of both permanent injunction and eviction, should the 2<sup>nd</sup> defendant refuse to vacate the land voluntarily.**

5. The 1<sup>st</sup> defendant opposed the suit through a statement of defence dated **3/2/2022**. It is denied that the deceased was the registered owner of land title No. **Kitale Municipality Block 16/Kaura Wa Bechau/74** acquired in **1980**, measuring approximately **3.175 Ha**, or that it had been encroached upon by the 2<sup>nd</sup> defendant, and a caution/caveat was registered by the latter against its title register.
6. The 1<sup>st</sup> defendant averred that if indeed any caveat/caution was registered against the title register for the alleged suit property, which is denied, nothing would have stopped the 2<sup>nd</sup> defendant from lodging such an application with it, as the law allows the 2<sup>nd</sup> defendant if he has an interest on any land to lodge one, to preserve such property pending determination of any imminent threat to such interest in land.
7. The 1<sup>st</sup> defendant averred that if satisfied, it would register the caution after determining the capacity of

the person lodging the caution, to preserve the interest of the cautioner against any other person from dealing with the land in a way that prejudices the said interest.

- 8.** Further, the 1<sup>st</sup> defendant denied the alleged unsuccessful attempts by the plaintiff to remove the caution, and if at all any such attempts were made, the 1<sup>st</sup> defendant would not have removed the restriction as the 1<sup>st</sup> defendant was not satisfied that the plaintiff held any interest or right over the suit property, to warrant the removal of the caution on her behalf, under **Section 73(2) and (3)** of the Land Registration Act.
- 9.** The 1<sup>st</sup> defendant averred that the caveat was not lifted for failure by the author of the request to provide a grant of letters of administration as proof that she was the legal administrator of the estate of the registered owner, with legal rights to have dealings over the suit property. The 1<sup>st</sup> defendant denied knowledge of the alleged encroachment, or illegal takeover of the suit property by the 2<sup>nd</sup> defendant.
- 10.** The 1<sup>st</sup> defendant averred that no demand or intention to sue was made to it, contrary to the law.

- 11.** The 2<sup>nd</sup> defendant opposed the suit through a statement of defence dated **26/7/2022**. He denied the alleged encroachment, illegal takeover, or grabbing of a portion of the suit property, as alleged by the plaintiff, or at all. The 2<sup>nd</sup> defendant averred that on diverse dates between **15/10/1990** and **10/5/1994**, he bought **2** acres of land from the late Atambo Esiron Nakiran at **Kshs.120,000/=**, as part of the land comprised in Kaura Farm, plot number **22**, which caused the subdivision of the said farm sometime in **1995**, whereby she was issued a title deed on **22/4/1996** for the suit property measuring **3.175 Ha**. The 2<sup>nd</sup> defendant obtained his title No. **Kitale Municipality Block 16/Kaura Wa Bechau/75**, measuring approximately **0.8093 Ha**.
- 12.** The 2<sup>nd</sup> defendant averred that on or about **23/4/1994**, the plaintiff and he agreed to resolve their dispute, and he gave her access to the road to the river. Thereafter, the late mother surrendered the lower part of the suit property to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant averred that he had a very cordial relationship with the deceased and they had no boundary dispute with her at all.

- 13.** Further, the 2<sup>nd</sup> defendant specifically denied being in illegal occupation, taking over, or encroachment of **2.3657 Ha** of the suit property.
- 14.** The 2<sup>nd</sup> defendant denied that the plaintiff is the legal administrator of the estate of the late Atambo Esiron Nakiran, and shall raise a preliminary objection that she has no *locus standi* to bring the suit. The 2<sup>nd</sup> defendant avers that the boundaries between land parcel Nos. **Kitale Municipality Block 16/Kaura Wa Bechau/74** and **75** were demarcated on or about **15/10/1990**, which is over **32** years ago, and titles issued on **22/4/1996** and **6/2/1998**, respectively; hence, the plaintiff's claim is barred under **Section 7** of the Limitations of Actions Act.
- 15.** At the hearing, **Catherine Orondo Atambo** testified as **PW1**. She relied on a witness statement dated **11/11/2021** as her evidence-in-chief. PW1 told the court that her late mother acquired title No. **Kitale Municipality Block 16/Kaura Wa Bechau/74** in the **1980s**, measuring **3.175 Ha**, following which a title deed was issued in her name on **22/4/1996**. PW1 told the court that later she sold and transferred **1** acre of her land to the 2<sup>nd</sup> defendant as per a sale agreement dated **15/10/1990**, which he took

possession of, but later discovered that he had fenced off, encroached, and illegally taken over more land than he had been sold and transferred.

- 16.** PW1 stated that these developments prompted her late mother to write a letter dated **11/11/1998**, to the 1<sup>st</sup> defendant for intervention. PW1 said that the 2<sup>nd</sup> defendant, despite protests, has continued to illegally occupy more hectares of the suit property, even though he only purchased **0.8093** hectares as per the title deed issued to him for **Kitale Municipality Block 16/Kaura Wa Bechau/75**. PW1 explained that the 2<sup>nd</sup> defendant hindered her mother from accessing her land until she passed away on **31/7/2004**, by blocking her access to the riverbank.
- 17.** PW1 said that on **12/10/2016**, she discovered that the 2<sup>nd</sup> defendant had secretly, illegally registered a caution over the title register to the suit land with the 1<sup>st</sup> defendant, and despite letters dated **13/10/2016** and **8/11/2021** to the 1<sup>st</sup> defendant to intervene, the caution has not been lifted.
- 18.** Further, PW1 said that the original mutation form used to hive off the 2<sup>nd</sup> defendant's land by the 1<sup>st</sup> defendant and the surveyor from the suit property is clear, otherwise the 2<sup>nd</sup> defendant's acts are not only

fraudulent, illegal, but have also interfered with or violated her constitutional rights under **Article 40** of the Constitution, for hiving off and occupying more land than he was entitled to, which amounts to self-allocation, grabbing, and trespass to land.

- 19.** PW1 produced as exhibits a copy of the title No. **Kitale Municipality Block 16/Kaura Wa Bechau/74**, sale agreement dated **15/10/1999**, letter dated **11/1/1998** by the deceased to the 1<sup>st</sup> defendant, an official search certificate dated **11/11/1998**, for **Kitale Municipality Block 16/Kaura Wa Bechau/75**, official search dated **3/11/2020** for the suit property, letter dated **13/10/2016** over encroachment, letter dated **8/11/2021** to the defendants, demand letter dated **8/11/2021**, copy of original mutation form and the survey plan for the two titles, surveyor's report dated **28/4/2022**, court order dated **24/3/2022**, copy of a letter dated **16/3/2021**, certificate of confirmation of grant issued on **21/10/2021**, court order issued on **25/2/2025** in the succession cause, **Kitale P & A No. E011 of 2020**, as P. **Exhibit No. (1) - (15)** respectively.

- 20.** PW1 said that she discovered the caution while trying to file for the succession proceedings. PW1 said that the extent of the encroachment is **1.16 acres**, a portion of which the 2<sup>nd</sup> defendant did not pay for or obtain legally, from her late mother, which is a river at the lower side of the suit property. PW1 denied that her late mother had **9** other children, as alleged by the 2<sup>nd</sup> defendant.
- 21.** Equally, PW1 denied that her late mother received any consideration for the extra **1.16 acres** from the 2<sup>nd</sup> defendant as per the acknowledgement notes or sale agreement dated **15/10/1990**, in the list of documents in the 2<sup>nd</sup> defendant's trial bundle.
- 22.** PW1 denied that the area chief, Milimani, witnessed any sale agreement for the portion between her late mother and the 2<sup>nd</sup> defendant. Regarding **P. Exhibit No. (13)**, and **DMFI-(4)**, dated **23/4/1999**, PW1 disputed the alleged signature on the documents as belonging to her or being in attendance at such a meeting before the area chief on **23/4/1999**. PW1 denied executing such an agreement before the area chief. PW1 said that she learned about her late mother's complaint at the land office. PW1 denied knowledge of the surveyor's resolution, after an

alleged site visit by a Mr. Ayumba, to which the 2<sup>nd</sup> defendant paid **Kshs.11,000/=** as survey fees, to draw a sketch map.

- 23.** As to the letters dated **7/12/2009** and **15/12/2009** to the 2<sup>nd</sup> defendant, PW1 said that she was not privy to the same, or their makers, alleged to be her siblings. As to the surveyor's report dated **14/9/2023**, PW1 denied that **0.48 acres** of the suit property is riparian land. PW1 denied illegally obtaining the title deed for the suit property dated **22/4/1996**.
- 24.** The plaintiff was categorical that the boundary for the two parcels of land was fixed after the 2<sup>nd</sup> defendant bought the **2** acres; he ignored the same and fenced more land than he is entitled to, contrary to the Registry Index Map.
- 25.** PW1 said that her late mother was in active occupation of the disputed portion through a farm worker, where there used to be a structure. PW1 said that the county land surveyor's report was clear that the 2<sup>nd</sup> defendant had encroached on her land, contrary to what he was sold as **2 acres** by her late mother. The plaintiff disowned the receipts relied

upon by the 2<sup>nd</sup> defendant for **Kshs. 70,000/=**, allegedly paid to acquire the disputed portion.

- 26.** PW1 blamed the 1<sup>st</sup> defendant for registering and maintaining a caution over her title for no justification. PW1 said that the 2<sup>nd</sup> defendant had protested against the succession cause. Further, PW1 said that she was the sole beneficiary of the estate of her late mother as per **P. Exhibit Nos. (12), (13), (14), and (15)**; otherwise, no one else, as alleged by the 2<sup>nd</sup> defendant, came out to jointly claim to have been a sibling or beneficiary of her estate. PW1 said that the alleged siblings did not feature in the succession proceedings.
- 27.** PW1 said that though the 2<sup>nd</sup> defendant shows **0.80093 Ha**, the county surveyor's report established that he is occupying more land on the ground than he is entitled to, which forms part of her title deed.
- 28.** Further, PW1 said that, as per the RIM, her late mother's land should extend to the river. PW1 disputed the alleged sketch map and report by the 2<sup>nd</sup> defendant, since it was not made by a licensed surveyor, and she was not a party to his visit or report. PW1 said that her late mother never

authorized the planting of trees on the disputed portion by the 2<sup>nd</sup> defendant.

- 29. Protus Muindi** testified as **PW2**. As a Land Surveyor, he told the court that following a court order dated **24/2/2022**, he visited the two parcels of land Nos. **74** and **75**, in the company of the parties on **28/4/2022**, executed the terms and conditions of the order, and prepared a report dated **28/4/2022**, produced as **P. Exhibit No. (11)**.
- 30.** PW2 told the court that his findings were that, contrary to the description on the RIM, the parcel No. **75** occupies more land than what is on the title, which portion belongs to parcel No. **74**, as it is supposed to be **3.15 Ha**, which is equivalent to **7.85 acres**, in line with the title deed.
- 31.** PW2 said that on the ground, parcel No. **74** covers **6.48 acres**, which is less than the ground by **1.16 acres**. PW2 said that the extra **1.16 acres** belonging to parcel No. **74** are occupied by the 2<sup>nd</sup> defendant, whose land is supposed to be **2 acres** instead of **3.16 acres**; he currently has it fenced off. PW2 said that parcel No. **75** is wrongly demarcated on the ground, such that it encroaches onto parcel

No. **74** by **1.16 acres**, cutting off access to the stream from the plaintiff.

**32.** PW2 said that the attached to **P. Exhibit No. (11)** are certified copies of the RIM for the two parcels of land, which he relied upon in making his report. PW2 said that the ground measurements and realities must be aligned with the acreage in the title deed, in which case the 2<sup>nd</sup> defendant must cede to the plaintiff the extra acreage, belonging to title No. **Kitale Municipality Block 16/Kaura Wa Bechau/74.**

**33.** PW2 said that he visited the land on **13/4/2021**, but not on **13/4/2022**, after he was issued with the court order. PW2 said that he was not privy to the sale agreements between the deceased and the 2<sup>nd</sup> defendant. PW2 said that the RIM was not amended to reflect any agreements made between the 2<sup>nd</sup> defendant in relation to the access roads. He denied that there was any isolated riparian land in the RIM. In any event, PW2 said that parcel No. **74**, as per the map, is supposed to touch the stream. PW2 said that the plaintiff's land is the one that should be touching the stream and not plot No. **75.**

- 34. Professor Wanjala** testified as DW1. He relied on a witness statement dated **26/7/2022** as his evidence-in-chief. He told the court that on **15/10/1990**, he entered into a sale agreement with the late Atambo Eiron Nakiran to purchase **1** acre of land for **Kshs.50,000/=**, which he paid for, and that in **1990**, he bought another **1** acre, plus the catchment area at **Kshs.70,000/=** which he paid on various dates as per the acknowledgement receipts, till he cleared the balance on **10/5/1994**.
- 35.** DW1 said that sometime in **1995**, the seller executed a consent for subdivision and transfer, following which he obtained title deeds for the two parcels of land for parcel No. **74** measuring **3.175 Ha** and **No. 75** for **0.8093 Ha**. DW1 said that they did not have a dispute over the boundary with the seller until **1999**, when there was a complaint at the chief's office, Kibomet Location, on the access road to the river, by the plaintiff, on behalf of her late mother.
- 36.** DW1 said that on **23/4/1999**, they appeared with the plaintiff before the area chief and executed an agreement to resolve the dispute, and he agreed to grant the plaintiff an access road to the river, marking the end of the dispute. DW1 said that at the

time, the plaintiff at the time did not complain of any encroachment or occupation. DW1 said that he has been in occupation, since **1990**, of his **2 acres** of land, which includes the wetland that extends to the river, for a period of **32** years, and **24** years since he obtained the title deed for his land, without objection from the seller.

**37.** DW1 termed the suit a witch hunt, malicious, and coming too late. DW1 said that the plaintiff has siblings who are beneficiaries of her estate and lack locus standi to sue on behalf of the estate. DW1 denied receiving notices or letters from the plaintiff in relation to the issue before the suit was filed.

**38.** DW1 denied that he had encroached on the plaintiff's land. DW1 produced as exhibits a copy of the sale agreement dated **15/10/1990**, bundle of receipts, copy of the title deed for **Kitale Municipality Block 16/Kaura Wa Bechau/75** dated **6/2/1998**, copy of the dispute resolution agreement dated **23/9/1999**, survey sketch map, final map, and receipts dated **30/12/2001**, letter dated **7/12/2009**, survey report dated **14/9/2022**, letter dated **11/5/2010** from the area chief to the Land Registrar, as **D. Exhibit No.**

**(1), 2(a)-(g), (3), (4), DMFI-(5), (6), (7), DMFI-(8), and (9)** respectively.

- 39.** DW1 told the court that he has been on the land since **1995**, after he fenced off the portion, planted trees now in their maturity, for over **30** years, with no objection from the seller. DW1 said that he was not aware of the RIM until it was produced in court, yet what he said was done **10** years after he erected his fence. DW1 said that the surveyor did not visit his land and verify the correct boundary as it was agreed on **29/4/1999**, following the dispute resolution as per **D. Exhibit No. (4)**.
- 40.** DW1 said that the seller called the chief at the meeting, saying that she had no claim over his land in the presence of the plaintiff. DW1 said that after all the parties executed **D. Exhibit No. (4)**, they were happy, except for the issue that arose following the death of the seller in **2004**, which was harassment or malice on the part of the plaintiff.
- 41.** As to the caution. DW1 said that the same was filed by the plaintiff's siblings, as per entry No. **(4)** and also his entry No. **(5)** dated **4/6/2010**. DW1 said that up to the death of the seller in **2004**, no one disputed his occupation or the boundary after **D.**

**Exhibit No. (4)** was execution, though its recommendation or terms were yet to be implemented on paper, following the plaintiff taking away the original title deed.

- 42.** DW1 said that **D. Exhibit No. (9)** was written after she complained over non-implementation of **D. Exhibit No (4)**. DW1 said that though he had filed his protest in the succession cause, he could not tell the outcome. DW1 admitted that he is currently occupying more than is stated in the title deed issued on **6/2/1998**, because it forms part of a wetland.
- 43.** DW1 said that from the RIM, his land does not touch the river line. DW1 said that although the sale agreement relates to **1 acre**, the receipts he has produced reflect how he bought the extra land, including **Kshs.70,000/=**, for another **1½ acres**.
- 44.** DW1 insisted that the acknowledgement notes were legally executed. DW1 confirmed to have received the demand letter and responded to it as per **D. Exhibit No. (7)**. DW1 said that the initial boundary was shifted in **1995** after he planted the trees with the consent of the deceased seller. DW1 said that the extra land under his use since **1995** legally belongs

to him after he paid **Kshs.70,000/=** going by **D. Exhibit No. 2(a) -(g)**.

**45.** DW1 said that the RIM was drawn on **10/1/2005**, after he had already acquired the extra land as per **D. Exhibit No. (4)** DW1 said that he was authorised by the deceased to plant trees on the disputed land. DW1 confirmed that the deceased used to have a semi-permanent house on the disputed portion, which was occupied by her farm workers.

**46. Shem Kiptoo Sawe** testified as **DW2**. He relied on a witness statement dated **26/7/2022** as his evidence-in-chief. As a former Senior Chief Kibomet Location, now retired. DW2 told the court that he was aware of **D. Exhibit No. (4)**, which the plaintiff and the 2<sup>nd</sup> defendant executed before him, to settle a land dispute between parcels No. **74** and **75** into an access road, where the plaintiff was complaining on behalf of her late mother.

**47.** DW2 said that the two parties amicably resolved the issue by signing an agreement. DW2 confirmed writing a letter dated **15/5/2010** to the Land Registrar, seeking his intervention as per **D. Exhibits No. (7)** and **(9)**. DW2 confirmed visiting the suit property. DW3 said that on **23/4/1999**, the

deceased called him and confirmed that she was in Lodwar during the arbitration process. DW2 told the court that he handled the matter, though he had no powers in law to determine boundaries and matters of trespass.

- 48. Ben Wanyama** testified as **DW3**. He told the court that he is a Survey Assistant No. **253** working under Opiyo & Associates, ISK No. **4682**, though he had not attached his credentials to the report marked as **DMFI-(8)** dated **14/9/2023**. DW3 confirmed visiting the two parcels of land. DW3 told the court that the RIM was not reflective of the situation on the ground, hence its need to align the same with reality. He produced **DMFI-No. (8)** as **D. Exhibit No. (8)**. Asked what P. Exhibit No (1), DW3 faulted the same as regards the riparian land.
- 49.** DW3 confirmed that under **Sections 33(5), 36(b)** of the Survey Act and the letter dated **13/11/2025**, he was not a licensed surveyor and therefore **Exhibit No. (8)** was invalid to the extent that it was not countersigned or prepared with the assistance of his principal licensor. DW3 admitted that his report did not comply with **Section 33(5)** of the Survey Act;

hence, he was not competent to prepare and produce it.

**50. DW4 was James Omoni.** He relied on a witness statement dated **26/7/2022**. He disowned knowing the plaintiff. DW4 said that he never wrote a witness statement as alleged by the 2<sup>nd</sup> defendant to state that the late Atambo Sarah was his late mother, or that the plaintiff. DW4 said that he does not know anything about parcels No. **74** or **75**, or details about the deceased before the court. DW4 said that his mother is called Liguran and not Sarah Atambo. DW4 said that the 2<sup>nd</sup> defendant was a customer only who took his identification card for purposes of offering him employment at the County Government of Trans Nzoia, where he used to work.

**51. Jared Sharon** testified as **DW5**. As the Deputy Land Registrar, Trans Nzoia County. DW5 produced copies of the green card for parcels No. **74** and **75** as **D. Exhibit No (10)**. DW5 also produced the area list for Kaura Wa Bechau Farm and a letter dated **29/11/2022** as **D. Exhibit No. (11)** and **(12)**. DW5 said that from her land records, the two parcels of land were not subdivisions of each other but original parcels of land. DW5 confirmed that the title register

for parcel **No. 74** had a caution registered by the 2<sup>nd</sup> defendant, claiming a purchaser's interest.

- 52.** DW5 said that the title for parcel No. **74** was tallying with the acreage in the green card as per **P. Exhibit No. 11(b)**. Equally, DW5 said that the acreage of parcel No. **75** tallies with what is in the green card and the RIM. DW5 said that the RIM shows that there exists both an access record and a river accessed by parcel No. **74**.
- 53.** Further, DW5 had no records of the details of the cautioner and the nature of his grievances. DW5 said that the caution was not lifted, since the plaintiff at the time had no letters of grant of administration until it was presented to her office in **December 2022**, accompanied by Forms No. LR **39** and **42**. DW5 said that the prescribed form to lift the caution was never filled out.
- 54.** The plaintiff relies on written submissions dated **15/12/2025**, isolating seven issues for the court's determination. The plaintiff submits that the suit is not time-barred as claimed by the 2<sup>nd</sup> defendant under **Section 7** of Cap **22** in view of the court's ruling dated **29/3/2023**.

- 55.** Regarding the caution lodged on **4/6/2010**, the plaintiff submits that it was an unlawful exercise without justification, for the 2<sup>nd</sup> defendant has been unable to produce evidence of payments, acknowledgement receipts, a sale agreement, a mutation form for the extra portion measuring **1.16 acres**, and a valid title for the same, compared to the plaintiff's evidence and that of the 1<sup>st</sup> defendant in relation to the copy of records, title deed, area list and the surveyor's report.
- 56.** The plaintiff submits that despite written letters and a meeting at the Land Registrar, the 2<sup>nd</sup> defendant failed to lift the caution. The plaintiff submits that she did all that was expected of her under **Section 73(1), (2), and (3)** of the Land Registration Act, as admitted by DW5, yet the caution was not lifted. The plaintiff submits that the acts of the defendants interfered with her rights under **Sections 24, 25, and 26** of the Land Registration Act, without justification for lodging and maintaining the caution. Reliance is placed on **Maria Ngangi Gwako -vs- Charles Mwenzi Ngangi [2014] eKLR.**
- 57.** The plaintiff submits that even before the court, the 2<sup>nd</sup> defendant has been unable to substantiate his

right or justification to occupy **1.16 acres**, belonging to the estate of the deceased, with authentic documents of sale. The plaintiff submits that she is a *bona fide* legal administrator of the estate of her deceased mother, as per **P. Exhibit No. (12), (13, (14), and (15)** based on the copy of the title, green card, and confirmation of ownership and acreage by DW5. Her title for parcel No. **74** remains indefeasible on account of unsubstantiated interests by the 2<sup>nd</sup> defendant.

**58.** On encroachment, the plaintiff submits that her testimony and documentation, and the testimony of the surveyor, coupled with admission by the 2<sup>nd</sup> defendant, confirm the extent of trespass to land of **1.16 acres** by the 2<sup>nd</sup> defendant, which is not justified at all. The plaintiff submits that the letters produced by the 2<sup>nd</sup> defendant, dated **23/4/1999, 7/12/2009, 15/12/2009, and 11/5/2020**, are not admissible in law because the alleged advocate who wrote them died in **2014**, and hence amount to hearsay evidence.

**59.** As to **D. Exhibit No. (4)**, the plaintiff submits that the chief did not produce the original. The plaintiff submits that she was not privy to or a signatory of

the same, and that there was no forensic document examiner report to show that she signed it as per **Sections 48** and **70** of the Evidence Act. The plaintiff submits that the area chief lacks powers under the Chief's Act to handle such a dispute on boundary or encroachment, and therefore, **D. Exhibit No. (4)** and his evidence lacks probative value.

- 60.** As to the evidence of DW3, the plaintiff submits that the letter dated **12/11/2020** from the Land Surveyor's Board confirms that he is not a Licensed Surveyor and therefore his report offends **Section 33(5), (6), and (7)** of the Survey Regulations and **Section 14** of the Licensed Surveyors Code of Conduct. The court was urged to disregard or expunge the report from the court record.
- 61.** On trespass, the plaintiff submits that the survey report dated **28/4/2022** by PW2, documents by the Land Registrar, and her own evidence were consistent that the 2<sup>nd</sup> defendant is occupying **1.16 acres** of land belonging to parcel No. **74**; hence, trespass has been duly proved.
- 62.** On damages, the plaintiff submitted that she is entitled to such a remedy. Reliance is placed on **Park**

**Towers Ltd -vs- Joh Mithamo Njika [2014] eKLR,**  
*Halsbury's Law of England 4<sup>th</sup> Edition Vol. 45 para 26,*  
*1503, **Gakuria & Another -vs- Mwangi & Others***  
**[2025] KEELC 1041 [KLR], Parkar & Another -**  
**vs- NQ & Others Civil Appeal No. 139 of 2020,**  
**Republic -vs- John Nganga Njeri Criminal Case**  
**No. 73 of 2016,** and **John Chumia Nganga -vs-**  
**Attorney General & Another [2019] KEELC 3621**  
**[KLR].**

- 63.** The 2<sup>nd</sup> defendant relies on written submissions dated **16/12/2025**, isolating six issues for the court's determination. On the purchaser of the land from the deceased by the 2<sup>nd</sup> defendant, it is submitted that there is evidence tendered that what was bought was cumulatively 3 acres, inclusive of the riparian land. The 2<sup>nd</sup> defendant submits that the existing boundary for **26 years** should not be interfered with, and replaced by the boundary shown in the RIM and sheet map(s) drawn and registered in **2005**, long after **D. Exhibit No. (4)** was executed by the parties. The 2<sup>nd</sup> defendant submits that it is the RIM that should be amended to reflect the existing boundary.

- 64.** The 2<sup>nd</sup> defendant submits that the suit is time-barred in view of the issuance of titles in **1996** and **1998** and the erecting of the boundary in **1995**, which shows the suit is filed after **30 years**, hence offending **Section 7** of the Limitation of Actions Act.
- 65.** Further, the 2<sup>nd</sup> defendant submits that the plaintiff cannot purport to be the only beneficiary of the estate of her late mother, going by **P. Exhibit No. (2), D. Exhibit No. (2), D. Exhibit No. (6)**, and DW4 testimony or written statement and affidavit before the court, which unfortunately he disowned. The 2<sup>nd</sup> defendant urges the court to find that the plaintiff falsely obtained a confirmation of grant as the sole beneficiary of the estate.
- 66.** On lifting the caution, the 2<sup>nd</sup> defendant submits that the green card before the court shows that the 2<sup>nd</sup> defendant was not the only one who had lodged a caution against the title given entry No. **4** dated **19/11/2004**, by one of the children of the deceased. Therefore, the 2<sup>nd</sup> defendant submits that he filed the second caution to ensure that the plaintiff's siblings' interests were protected, and therefore it is for the court to decide the matter concerning other siblings of the deceased before the caution can be lifted,

otherwise he had exercised his duties as per the instructions of the late Sarah Atambo Esiron.

**67.** The 2<sup>nd</sup> defendant urged the court to find the case as overtaken by effluxion of time, find the boundary was in existence for about **10** years before the RIM was drawn and registered, decline to interrupt the status quo on the ground, and dismiss the suit with costs.

**68.** The issues calling for my determination are:

**(1) If the plaintiff has established trespass, encroachment, grabbing, and illegal takeover of the suit property.**

**(2) If the 2<sup>nd</sup> defendant was justified in entering, occupying, using, and developing the 1.16 acres of the suit property.**

**(3) If the 2<sup>nd</sup> defendant was justified in admitting registering and sustaining the caution over L.R. No. Kitale Municipality Block 16/Kaura Wa Bechau/74.**

**(4) If the plaintiff is entitled to the reliefs sought.**

**(5) What is the order as to costs?**

**69.** Trespass to land is governed by **Section 3(1)** of the Trespass Act **Cap 294**. It is an intrusion by a person into a land of another who is in possession and ownership without his authority, consent, or justification. Once proved, trespass is actionable *per*

se, without proof of damages, as held in **Park Towers Ltd -vs- Mithamo** (*supra*).

- 70.** In **Azzuri Ltd -vs- Pink Properties Ltd Civil Appeal No. 93 of 2017**, the claim was that the defendant had erected permanent constructions on the appellant's suit land exceeding the legal boundaries, thereby constituting trespass.
- 71.** At the trial, the court found that what was disputed was a general boundary over which the court had no jurisdiction. The Court of Appeal agreed with the trial court. It was observed that the appellant had not raised the issue of encroachment with the Land Registrar or the neighbours, for it to be fixed.
- 72.** In **Kenya Power and Lighting Company -vs- Ringera & Others [2022] KECA 104 [KLR]**, the court cited **M'Mukunya -vs- M'Mbijiwe [1984] KLR 161**, where the court cited with approval **Municipal Council of Eldoret -vs- Titus Gatitu Njau [2020] eKLR**, that trespass is a violation of the right of possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land, which is different from ownership.
- 73.** In this suit, the plaintiff takes the view that the only land that her late mother sold to the 2<sup>nd</sup> defendant

was **2 acres**, which was lawfully transferred and registered under his name and no more, as per the title deed held in the name of the late mother and the 2<sup>nd</sup> defendant.

- 74.** The plaintiff denies that the 2<sup>nd</sup> defendant was entitled to the **1.16 acres** of land, now established by the surveyor's report as under his occupation. **D. Exhibit No. (3)** was issued on **6/2/1998** for **0.8093 Ha** under RIM **1(75/3/20)**. It is the same RIM that is reflected in **P. Exhibit No. (1)**, for title No. **Kitale Municipality Block 16/Kaura Wa Bechau/74**, measuring **3.175 Ha**.
- 75.** The plaintiff's title deed was the first to be issued on **22/4/1996**, unlike that of the 2<sup>nd</sup> defendant. **P. Exhibit No. (2)** is the sale agreement produced as **D. Exhibit No. (3)**. **P. Exhibit No. (3)** was written by the deceased to the 1<sup>st</sup> defendant, complaining about encroachment on **11/11/1998**. This was almost nine months after the 2<sup>nd</sup> defendant obtained his title deed. The initial complaint was followed by **P. Exhibits No. (6), (7), (8), and (9)** dated **13/10/2026** and **8/11/2021**, in relation to the caution.

- 76.** After the 1<sup>st</sup> and 2<sup>nd</sup> defendants took no action, the plaintiff had no option but to move to court and obtain a court order dated **24/11/2022**, produced as **P. Exhibit No. (12)**, out of which the surveyor visited the land and prepared **P. Exhibit No. (11)** showing the extent of the encroachment.
- 77.** From the plaintiff's further exhibits, it appears that she obtained a grant of letters of administration on **16/3/2021** and later a confirmation of grant on **21/10/2021**, produced as **P. Exhibits No. (13)** and **(14)**, as the sole heir and legal administrator of Title No. **Kitale Municipality Block 16/Kaura Wa Bechau/74**. Therefore, by the time the **P. Exhibits No. (7), (8), (9),** and **(10)** were written to the 1<sup>st</sup> and 2<sup>nd</sup> defendants; the plaintiff had already been appointed and confirmed as the legal representative and the sole beneficiary of the suit property.
- 78.** The plaintiff, in view of the restriction against the title deed, has not been able to transfer the land to her name. In **P. Exhibit No. (15)**, the application dated **17/11/2022** was withdrawn, and the estate was decreed and remaining in the name of the plaintiff. From the copy of records listed in the list of documents to the 1<sup>st</sup> defendant, entry No. **(5)** is a

caution recorded against the title by the 2<sup>nd</sup> defendant on **4/6/2020**. It remains the sole restriction on the title to date, after the caution registered on **1/11/2004** was withdrawn on **1/11/2016**, pursuant to entry No. **(6)**.

- 79.** The 2<sup>nd</sup> defendant in the caution claims the purchaser's interests. To sustain his statement of defence, the 2<sup>nd</sup> defendant relies on **D. Exhibits No. (4), (5), 5(b), (6), (7), (8), and (9)**. In the letter dated **15/12/2009**, the 2<sup>nd</sup> defendant states that the land alleged to be under trespass was bought on **15/10/1990**. In the letter dated **11/5/2010** to the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant states that he had bought the land from the deceased.
- 80.** Courts do not rewrite contracts between parties, but enforce them unless vitiated by illegality, fraud, or misrepresentation. See **National Bank of Kenya Ltd -vs- Pipeplastic Samkolit (K) Ltd & another [2001] eKLR**. The law of the Contract Act, Cap **23**, was amended with effect from **2003**.
- 81. Section 3(3)** of the Act provides that a contract on the disposition of an interest in land must be in writing. See **Peter Mbiri Michuki -vs- Samuel Mugo Michuki [2014] KECA 342 [KLR]**. It is the

2<sup>nd</sup> defendant who claims the purchaser's rights. The same claim is the one that has caused the existence of the restriction. The burden is on he who alleges the existence of certain facts to prove them under **Sections 107-112** of the Evidence Act,

- 82.** The 2<sup>nd</sup> defendant relies on **D. Exhibit No. (7)**. The sale agreement does not indicate the parcel number and its locality on the ground. It speaks to one acre of land and not more than that. **D. Exhibit No. 2(a)-(g)** do not indicate the parcel numbers and the issuer of the receipts as the deceased mother to the plaintiff. The 2<sup>nd</sup> defendant has not produced any forensic document examiner report to show that the maker of the receipts or the recipient therein was the plaintiff's deceased mother, who appended her signature or thumbprint thereon. The said receipts do not amount to a sale agreement as envisaged by **Section 3(3)** of the Law of Contract Act and **Section 38** of the Land Act.
- 83.** The late Sarah Atambo Esiron passed on, on **31/7/2004**. Between **1990** and **2004**, there is no evidence that the 2<sup>nd</sup> defendant regularized any transfer of the alleged extra acres of land measuring **1.16 acres**, before the registered owner passed on.

- 84.** Between **2004** and the filing of this suit, there is no evidence that the 2<sup>nd</sup> defendant sought from the plaintiff to have the transfer effected. **D. Exhibit No. (4)** is not a transfer form. There is no evidence that the 2<sup>nd</sup> defendant prepared an application for land control board consent, booked the board for both subdivision and transfer, to have the **1.16 acres** of land transferred to his name.
- 85.** Indeed, after the plaintiff obtained a confirmed grant in **2021**, there is no evidence that the 2<sup>nd</sup> defendant sought to have the land under his occupation formally transferred and registered under his name. **D. Exhibit No. (7)** and **(9)** do not speak to any such demands for a formal transfer at all. The 2<sup>nd</sup> defendant bought the extra **1.16 acres** from the deceased before **1998**, as alleged in paragraphs **(5)**, **(6)**, and **(7)** of the statement of defence dated **26/7/2022**. It defeats logic why he obtained a title deed for parcel No. **75**, which is less in acreage, and thereafter did not demand from the deceased before **2004** for the transfer of the remainder of the acreage.
- 86.** In the letters dated **11/11/1998**, **13/10/2016**, and **2/11/2021** produced before this court, the deceased

and the plaintiff have been emphatic that the 2<sup>nd</sup> defendant is encroaching on the suit land.

- 87.** In all the 2<sup>nd</sup> defendant's letter produced before this court, there is no mention of the exact sale agreement terms and conditions thereof, consideration, dates of payments of the consideration, and timelines which the two parties to the sale agreement(s) in relation to the **1.16 acres** of land were executed, signed, and completed. The letters written by the 2<sup>nd</sup> defendant are not consistent with **D. Exhibit No. 2(a)-(g)**.
- 88.** Further, and more importantly, there is no indication in the 2<sup>nd</sup> defendant's pleadings and his testimony when he sought and obtained the vendor(s) consent authority or approval to take vacant possession of the **1.16 acres**. The 2<sup>nd</sup> defendant, in his defence, has not sought specific performance of the sale agreements he alludes to. Instead, he asks the court to find the plaintiff lacking *locus standi*, despite **D. Exhibit No. (14) and (15)**,
- 89.** In paragraph **14** of the defence, the 2<sup>nd</sup> defendant pleads that the boundaries between parcel Nos. **Kitale Municipality Block 16/Kaura Wa Bechau/74** and **75** were demarcated on

**15/10/1990**, over **32** years ago, and title deed issued on **22/4/1996** and **6/2/1998**, hence the plaintiff's suit is time-barred. It is the 2<sup>nd</sup> defendant who is alleging entry into the suit property on account of a sale agreement. If his sale agreements were made in **1994**, then the claim for the land out of a contract expired after **6** years as per **Section 4(1) Cap 22**.

- 90.** On the other hand, the plaintiff's cause of action is based on trespass, which has continued from **1998** to the present. In **Eliud Njoroge Gachiri -vs- Stephen Kamau Nganga [2018] eKLR**, a case of continuing trespass was said to consist of a series of acts done on consecutive days that are of the same nature and are renewed or continued from day to day, making an aggregate indivisible harm. See also **Muthiora -vs- Marion Muthama Kiara [2022] KECA 28 [KLR]**. In **Gladys Koskey -vs- Benjamin Mutai [2017] eKLR**, the court found the preliminary objection not merited or substantiated during the hearing.
- 91.** Coming to the lodging, registration, and sustenance of the caution since **2010**, a caution is a legal notice registered against a title deed. The law allows a Land

Registrar to register a caution for anyone with an equitable or legal interest over the land. A caution typically forbids any new dealing on the land without first notifying the cautioner. It gives a party a chance to protect the alleged interest in the land.

**92.** A caution can be withdrawn voluntarily or where the registered owner applies for the removal. The Land Registrar may hold a hearing if the cautioner objects. The plaintiff has termed the acts of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as illegal and unjustified. The plaintiff has tendered evidence of letters that she wrote seeking the lifting of the caution under **Section 71(3)** and **73(1)** of the Land Registration Act. The onus was on the 2<sup>nd</sup> defendant to justify its existence or sustenance before the 1<sup>st</sup> defendant. See **Maria Ngangi Gwako -vs- Charles Mwenzi Ngangi [2014] eKLR.**

**93.** In **Simon Kimemia Muthondu -vs- Moses Mugo Maringa [2017] eKLR,** the court said in considering an application for removal of a caution, the court looks into the circumstances, and the justification for which the caution was lodged, what interests the person lodging the caution has on the land and what prejudice will be caused to the other party, if the

caution is lifted. **Section 75** of the Land Registration Act provides that a person who lodges or maintains a caution wrongfully or without unjustifiable cause may be liable for damage.

- 94.** In **Zablon Kamau Nyoro (Suing as the legal representative of the estate of John Nyoro Ngigi) -vs- Lason Mayodi Ombisa & 2 others [2019] KEELC 133 (KLR)**, the court cited **Ahmed Ibrahim Suleiman & Another -vs- Noor Khamisi Surur [2013] eKLR**, that a caution acts as a stopgap measure to enable the cautioner or caveatee to initiate an action to establish his or her interest.
- 95.** Three ways to remove a caution include voluntary withdrawal, a court order, and by the Land Registrar. See **Joseph Kibowen Chemjor -vs- Willian C. Kiseru [2012] eKLR**. In **Peter Kagunza Adaji -vs- Sikukuu Maritim Maiyo & Another [2017] eKLR**, the court found the caution improper, illegal, and unjustified for the 2<sup>nd</sup> defendant lacked the capacity to impose one.
- 96.** The 2<sup>nd</sup> defendant, in my view, now and as at the time of the lodging of the caution, has been unable to justify the basis. I find the caution was maliciously registered and sustained. I say so because the 2<sup>nd</sup>

defendant, until he was sued, had not made any efforts to advance his claim either against the deceased before the caution, or soon thereafter, until he was sued in **2021**, he had not made any claim for the suit property.

- 97.** The next issue is whether the plaintiff is entitled to general damages for trespass and encroachment. Trespass is actionable **per se** as held in **Park Towers -vs- Mithamo** (*supra*). In **Obongo -vs- Municipal Council of Kisumu [1971] EA 91**, the court said that once the plaintiff proved ownership and encroachment, the burden shifted to the defendant to justify the trespass.
- 98.** The plaintiff has testified that with effect from **1998**, the 2<sup>nd</sup> defendant has not only been on the suit property, but also has used the caution to prevent her use, occupation, and possession of the suit property without justification. The plaintiff, as a registered owner, has a right under **Article 40** of the Constitution. The denial of the enjoyment of those rights from **1998** to the present has not been denied by the defendant.
- 99.** The caution still exists on the title register. The plaintiff is unable to effect any dealings on the title

even after she acquired a confirmation of grant in **2021**. The same case applies to entry into and use of the suit property. So, the plaintiff has suffered both ways courtesy of the 2<sup>nd</sup> defendant.

**100.** A permanent injunction is granted upon the merits of the case after the rights of the parties are determined. It is granted in perpetuity to prevent breach of or commission of acts by the defendant. See **Kenya Power & Lighting Co. Limited -vs- Sheriff Molana Habib [2018] eKLR.**

**101.** A mandatory injunction, on the other hand, is granted as held in **Kenya Breweries Limited -vs- Washington Okeyo (2002) 1 EA 109,** where a defendant attempts to steal a match from the plaintiff.

**102.** In this suit, there is no doubt that the plaintiff has been subjected to suffering loss and damage by the 2<sup>nd</sup> defendant. I think the plaintiff is entitled to the reliefs sought. I proceed to enter judgment as follows. **That:**

**a)The illegal encroachment, takeover, grabbing, and boundary walls and a fence, as erected on more hectares of title No.**

**Kitale Municipality Block 16/Kaura Wa Bechau/74 is illegal and unlawful.**

- b)The encroached and or grabbed land of more acres on the suit property belongs to the estate of the deceased.**
- c)An order is hereby issued compelling the 1<sup>st</sup> defendant to rectify the register of any entry invalidating the purported caution on the title deed to the suit property placed on the register by the 2<sup>nd</sup> defendant on 4/6/2010.**
- d)Permanent injunction restraining the 2<sup>nd</sup> defendant, his agents, servants, or assignees; (i), from interfering with the plaintiff's quiet possession, use, occupation, and enjoyment of the suit property; (ii), from trespassing, or in any way dealing with the suit property, and; (iii) an order compelling them to vacate the suit property, failure to which they be forcefully evicted from title No. Kitale Municipality Block 16/Kaura Wa Bechau/74.**
- e)General and exemplary damages at Kshs.2,000,000/=, as compensation for the**

**trespass and the illegal activities thereon, with effect from 4/6/2004 to date.**

**f) Order that the OCPD Kitale and DCIO Kiminini ensure compliance with the orders granted of both permanent injunction and eviction in line with the law, should the 2<sup>nd</sup> defendant refuse to vacate the land voluntarily.**

**g) Costs of the suit to the plaintiff are to be met by the 2<sup>nd</sup> defendant.**

**103.** Orders accordingly.

**Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 25<sup>th</sup> day of February 2026.**

**In the presence of:**

Court Assistant - Dennis

Mr. Kaikai for the plaintiff

Nyakundi for the defendant present



**HON. C.K. NZILI  
JUDGE, ELC KITALE.**