

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ELC CASE NO. E006 OF 2023

DANIEL MWENDWA MUTUA

APPELLANT

VERSUS

GRACE MUTHONI NJERU

RESPONDENT

JUDGEMENT

1. By a plaint dated 12/5/2023 and filed in court on 13/5/2023, the plaintiff - DANIEL MWENDWA MUTUA - impleaded the defendant - GRACE MUTHONI NJERU - before this court for the reason that she has on several occasions trespassed upon his land - land parcel No. Kyuso/Katse/4560 - and caused chaos. An aspect of the chaos caused include disturbing the plaintiff's old and sickly mother who lives in the home built on the land. The defendant is said to be taking advantage of the plaintiff's absence - the plaintiff lives in USA - to enter the land and cause chaos.

2. It is clear from the plaint that the defendant is the plaintiff's former wife. There were divorce proceedings between the two in USA and the court dissolved their marriage. In the plaint, reference is made to a portion of the judgement that ended the marriage. The purpose of making reference to the portion is to show that the disputed land was decreed to him in the judgement, thus making it his personal property.

3. The plaintiff is asking for the following orders:

(a) *An order of permanent injunction stopping the defendant whether by herself, her employees, her agents, or any other person authorized by herself herein from stepping, accessing, living, staying, utilizing, using in any manner wasting, transferring possession, selling, dealing, interfering with land parcel know as land title number Kyuso/Katse/4560 situate in Kyuso County (sic) the property of the plaintiff.*

(b) *General damages as this court may deem fit and just to grant.*

(c) *That (sic) an order the defendant drops forthwith the use of the name "Mutua" in her documents, references, introductions or anywhere else whatsoever.*

(d) *Costs of this suit.*

(e) *Any other or further remedies as the court may deem fit and just to grant in the circumstances.*

4. The defendant responded to the suit via a defence dated 24/3/2024. She denied the plaintiff's entire claim. She pleaded, *inter alia*, that the land in dispute is where her matrimonial home is and that matrimonial home is the one the plaintiff is alleging to have put up for his parents. The defendant pleaded that it is a home she invested in heavily both financially and emotionally.
5. Further, the defendant pleaded that the plaintiff and his lady friend twice attacked her physically and even kicked her out of that same home and it was only due to court's intervention that she was able to regain access to the home.
6. The court was asked to dismiss the plaintiff's suit.
7. The court started hearing the matter on 11/3/2025. The plaintiff testified as PW1. He adopted his written witness statement as his evidence and produced as exhibits all the documents filed by him in support of his case. The court accepted the documents as plaintiff's Exhibit No's 1 to 13. In court, he said that the defendant was his former wife but they

are officially divorced by dint of a judgement delivered by a court in United States of America. That judgement was subsequently adopted and/or accepted by our courts here. The plaintiff further said that it is not true to say the disputed land is in joint names of himself and the defendant.

8. Further still, the plaintiff said that the judgement that granted an order of divorce was clear that the properties that were in sole or individual name of the party would remain owned by such party. From this stated position, the land in dispute was said to be singly owned by the plaintiff as it is in his sole name. The defendant was accused of trespassing into the disputed land and harassing the plaintiff's parents.
9. In the written witness statement made by the plaintiff, much of what he stated while testifying in court is reiterated. From the statement, it is clear that the parties divorced on 2/6/2020 and the judgement decreeing their divorce was adopted and/or accepted by the High Court of Kenya on 23/2/2023. According to the plaintiff, the judgement covered issues of property, custody of children, and matters of inheritance. Specific reference was made to a portion of the judgement which stated as follows.

“IT IS FURTHER ORDERED AND ADJUDGED that each party affirms that he or she has fully and accurately disclosed all the assets owned in which he or she has any interest and that except as stated above, each party is awarded all personal property as his or her sole and separate property those items of personal property now in their respective possession, and each party is responsible for any outstanding balance due on said property, and shall hold the opposing party harmless of any further claims.”

10. The defendant was said to have been going to the disputed land and harassing the plaintiff's elderly parents. She is said to have chased the defendant's employees from the land; banned the plaintiff's sister from planting crops; detained motor vehicles meant for plaintiff's mother; and also chased the drivers away. Further, an employee of the defendant, one Patrick Muthui, is said to have one time refused to open the gate for those living in the household thus making the plaintiff mother and sister sleep outside the home. The mother also has had occasion to sleep in an old car in the garage because the defendant had closed the door to the house.

11.The defendant did not give evidence. But she responded to the suit via a defence dated 24/3/2024. She also filed submissions.

12.It is necessary now to have an overview of the submissions filed. The plaintiff's submissions start with introductory remarks followed by a short highlight of the background to the matter. What follows thereafter is an analysis that focuses on the issues that the plaintiff deems necessary for determination.

13.The first issue is whether the plaintiff has met the threshold necessary for grant of a permanent injunction. According to the plaintiff the conditions necessary for grant of a permanent injunction are similar to the conditions required for a grant of a mandatory injunction. The plaintiff then cited and quoted the case of **Maher Unissa Karim -vs- Edward Oluoch Odumbe [2015] eKLR** where the conditions necessary for grant of mandatory injunction were stated and where it was also pointed out that those conditions are different from the conditions for grant of a prohibitory injunctions as spelt out in the *locus classicus* case of **Giella -vs- Cassman Brown & Co. Ltd. [1973] EA 358.** In the case, an excerpt from

Halsbury Laws of England, Vol. 24, 4th Edition, paragraph 948 was quoted thus:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

14. It was submitted that special circumstances exist in this case to warrant a grant of permanent injunction. The defendant was faulted for saying that the suit property is her matrimonial home yet she does not live there. According to the plaintiff, the defendant's matrimonial home is in U.S.A. The suit property was said to have been purchased and developed by the plaintiff specifically for his aged parents. The defendant is said to have been trespassing into the property and causing chaos and this is said to be affecting the plaintiff's aged mother. This is also said to constitute the

special circumstances justifying the grant of a permanent injunction.

15. Further, the suit property is said to be registered solely in the name of the plaintiff and the plaintiff is therefore said to have the right to be treated as its absolute owner with a title that is indefeasible or unimpeachable except as allowed by law.

16. The defendant was said to have filed no defence and she is also said to have mentioned a different property from the one in dispute. More specifically, she mentioned land title number Kitui/Katse/4563 while the property which is the subject matter of this land is title number Kyuso/Katse/4560.

17. Reference was also made to the judgment that decreed a divorce between the plaintiff and the defendant. The judgement was issued by a court in U.S.A. and was subsequently adopted in Kenya by an order of the High Court to make it a pronouncement having the force of law in Kenya as between the two parties. According to the plaintiff, the part or portion of the judgement pronouncing itself on personal property is the one that vests in him absolute and exclusive ownership of the disputed land. The plaintiff submitted that the defendant *“has no colour of right*

whatsoever to interfere with the plaintiff's sole personal property."

18.As a final submission on the issue of permanent injunction, the defendant was said to be intent on depriving the plaintiff the disputed property through an illegal process, which in the plaintiff's view, is tantamount to causing irreparable loss.

19.The second issue delineated by the plaintiff is about whether he is entitled to the orders he is seeking. It was pointed out that the plaintiff has demonstrated well the prejudice that will befall him if the orders he is seeking are not granted. According to the plaintiff, failure to grant the orders would amount to gross violation of his property rights as guaranteed by the Constitution. The plaintiff also said he is entitled to damages arising from infringement of his rights. The court was ultimately urged to allow the suit with costs to the plaintiff.

20.For persuasion to the court and/or reinforcement of the issues raised in the plaintiff's submissions, the cases of **Mburu -vs- Kibara & 2 others (Environment & Land Case No. 237 of 2021) KEELC 3226 (KLR) (28th July 2022) (Ruling), Eyasu Wolde Gabriel -vs- Isaac Muteru & 9 others [2013]**

KEHC 3818 (KLR), Sharok Kher Mohamed Ali & Another -vs- Southern Credit Banking Corporation Limited [2008] KEHC 3652 (KLR), and Jogoo Kimakia Bus Services Ltd. -vs- Electrocom International Ltd. [1992] KLR 177, among others, were cited and quoted as deemed necessary.

21. The defendant's submissions are dated 1/8/2025. The defendant started with a highlight of the background and circumstances surrounding the matter. The parties were said to have tied their marriage knot on 11/8/2007 in U.S.A. They have since been blessed with three children. In the year 2015, the parties bought land where they put up their matrimonial home. The property is the disputed land and is at Kalawa, Mumoni Ward, Mwingi North Sub-County, Kitui County. The defendant submitted that she participated in the acquisition and development of the property both financially and physically.

22. The defendant's parents are said to have their matrimonial home in a place called Ngaie, Kyuso Ward, and that is where the father of the plaintiff lives with another wife called Kasyoka. The plaintiff's mother, Koki Mutua, is also said to

have a home there. The plaintiff and his brothers are said to have a home there. The plaintiff and his brothers were also said to have been allocated by their father portions of ancestral land. The plaintiff was said to be alleging purchase of the disputed land for his parents in order to disentitle the defendant of possession.

23. Sometimes in 2016, the defendant, with alleged concurrence and urging of the plaintiff, is said to have relocated from U.S.A. to join politics here in Kenya. The aim was to run for a parliamentary seat but she ended up becoming a nominated member of Kitui County Assembly. The defendant relocated to Kenya with the children of the marriage but the plaintiff is said to have whisked the children back to U.S.A. Then at some point, the plaintiff started complaining of the defendant's work schedule and constant travel in execution of her duties. The plaintiff urged the defendant to resign from her work but the defendant refused.

24. The two thereafter became estranged and the plaintiff is said to have started cohabiting with their house girl at their Kalawa matrimonial home. Things appeared to have been moving from bad to worse for the defendant. The plaintiff is said to

have cunningly filed a suit at Kyuso accusing the defendant of trespass into the disputed property. The matter was however dismissed but some other suits by the plaintiff followed. They were all aimed at seeking eviction of the defendant from the matrimonial home.

25. According to the defendant, the issues to be determined are whether the disputed property is matrimonial in nature; whether the plaintiff can lawfully exclude her from the property; and whether the orders sought in the suit are available under Kenyan Law.

26. As to whether the disputed property is matrimonial, the defendant submitted that it is as it was purchased and developed in the year 2015 during subsistence of the marriage between the parties. The defendant is said to have contributed directly and indirectly to its development and the matrimonial home is said to be on the property and is therefore protected under the Matrimonial Properties Act, 2013. To drive home the point, the case of **TMM -vs- JIL [2014] eKLR** was cited. In the case, the court observed that property acquired during marriage is presumed to be matrimonial property unless proved otherwise. The plaintiff

herein was said to have failed to show that the defendant was excluded from the acquisition, development and/or use of the property.

27. On whether the plaintiff can lawfully exclude the defendant from the property, the defendant made reference to Section 12 of the Matrimonial Property Act to make the point that one spouse cannot alienate property acquired during marriage without consent of the other spouse. Further, it was pointed out that under our Constitution, parties to a marriage are entitled to equal rights at the time of marriage, during its subsistence, and at the time of its dissolution. The defendant emphasized that she has been occupying the property even after the dissolution of the marriage.

28. As regards whether the orders sought are available under Kenyan Law, the defendant submitted that granting of the orders would amount to eviction from her home. This was said to be contrary to principles of equity or fairness, and even contrary to the Constitution of Kenya, 2010.

29. Ultimately the court was urged to dismiss the plaintiff's case, declare the disputed land to be matrimonial property, and grant a permanent injunction restraining the plaintiff from

evicting or interfering with the defendant's occupation until the matrimonial property is equitably distributed.

30. I have considered the suit as filed, the evidence tendered by the plaintiff's side, rival submissions, and the other materials made available. It is common ground that the parties were once married but the marriage no longer subsists as it was annulled via divorce proceedings that took place in U.S.A. The judgement that ended the marriage was adopted as an order of the High Court of Kenya on 17/2/2023.

31. According to the plaintiff, the disputed property is a personal one by dint of the court's pronouncement in the judgement delivered by the Family Division of Circuit Court for the County of Wayne, State of Michigan USA. That court, among other things, decreed to each party ownership of personal property in which each has interest. It seems also to be the plaintiff's position that the disputed property is his because he is its sole registered owner. But the defendant sees the property differently. To her, it is matrimonial property and home and she has a stake in it by virtue of her contribution in its acquisition and development.

32. The defendant filed defence in response to the suit but she didn't prepare for hearing of the suit after that. The matter was subsequently heard without her input. She didn't even deem it necessary to file her witness statement. But she filed submissions where, among other things, the issues for determination are delineated followed by a legal analysis. There are also prayers made in the submissions.

33. The approach taken or adopted by the defendant is problematic. Usually, where a defence to a suit is filed, it is expected that pre-trial process geared towards making the matter ready for trial should follow. The defendant only filed a defence. The court waited to see if there would be compliance with other procedural requirements. There was none. It then became inevitable to hear the plaintiff's case without the defendant's input. The prosecution of the case therefore went on without the defendant. When she later filed submissions and made some prayers in them, the basis for the prayers seemed misplaced. One would have expected that if the defendant was serious about getting the prayers sought in the submissions, she should have included a counter claim in her response to the suit. It is in such counter

claim that one would expect to find such prayers. The other side then would have had a chance to respond to the counter claim and controvert the prayers.

34. But the defendant's submissions focused on a point that cannot be easily wished away. The point relates to the applicability of the matrimonial property Act, 2013. Flowing from this was another corollary point raised as an issue viz: Whether the plaintiff can lawfully exclude the defendant from the suit property. It was then pointed out that the disputed land was acquired in the year 2015 during subsistence of the marriage between the parties. Further, it was also alleged that the home on the land is actually a matrimonial one and the defendant is said to have contributed financially and physically to its construction.

35. The plaintiff on the other hand views the property as his own first because the divorce judgement issued by a court in U.S.A vested ownership in him and secondly because the property is solely registered in his name.

36. I have read the judgement that decreed divorce between the plaintiff and the defendant. The plaintiff is basing his assertion of ownership on a portion of it captioned "*PERSONAL*

PROPERTY DIVISION.” Under that caption, each party was awarded the personal items or properties that each possessed and/or were specifically mentioned in the portion of judgement that the plaintiff is relying on.

37. My considered view is that the plaintiff’s appreciation of the judgement he got from U.S.A, particularly concerning its meaning and purport needs a reality check. With tremendous possible respect, the judgement is not a pronouncement on ownership of the disputed land or any of the other other properties owned singly or jointly by the parties in Kenya. It is a misapprehension of the substance of the judgement to construe it as conferring rights of ownership of the disputed land. It is necessary to point out that it is not even possible in law to subsume the disputed land as personal property of the type referred to in the portion of the judgement that the plaintiff is relying on. Personal property in law refers to chattels or other tangible or moveable items owned or possessed by a person. A major defining attribute of personal properties is their moveability.

38. Land is immoveable property. It is also REAL PROPERTY. All buildings and other permanent fixtures on land are treated as

immoveable property in law. In the judgement referred to by the plaintiff, there is, just below the portion the plaintiff is relying on, another portion captioned "*REAL PROPERTY DIVISION.*" If the judgement issued was to address itself to the disputed land, that section is where it would be included. It is clear to me that under that portion, the judgement only addressed itself to the parties' marital home in U.S.A. There is no reference whatsoever to the disputed land.

39. But even from a pragmatic or commonsensical stand point, it becomes difficult to see how a court in a far-away jurisdiction like U.S.A can make a determination on ownership of land situate outside its own jurisdiction. It is difficult to see how that can happen without making reference to the laws governing property relations in such jurisdiction. Kenya and U.S.A share broadly similar property law relations particularly in the realm of Common Law and Equity. But there are unique differences in property relations arising from application of legislative enactments in each jurisdiction. Such differences are important to appreciate because where legislature speaks through formal statutes or enactments, its voice is usually taken by the courts as overriding all else.

40.I also reckon that the plaintiff could also be calling the disputed land personal property because it is solely registered in his name. It is easy to appreciate that in everyday language, that is how a layman would view the situation. But the plaintiff fails to understand that the judgement he is relying on does not use the term "*Personal Property*" that way. The term is used in its legal sense. May be the question that the plaintiff should ask himself is why the marital home in U.S.A came under the caption "*REAL PROPERTY DIVISION*" instead of "*PERSONAL PROPERTY DIVISION.*" And the simple answer would be that a home, just like land, is never treated in law as personal property. It is always real property.

41.Having now explained that the disputed land is not personal property as known in law, and further having pointed out that the judgement delivered in U.S.A is not a judicial edict on its ownership, it is now apt to consider whether it would be right in this matter to consider the disputed land as owned by the plaintiff to the exclusion of the defendant. Under Kenyan Law – see particularly Section 6 (1) of the Matrimonial Property Act, 2013 – matrimonial property would comprise, among other things, matrimonial home or homes and the household

goods in the home or homes. The defendant submitted that the house on the disputed land is her matrimonial home. She even seemed to suggest that some of her personal effects are in that home. Indeed, she alleged that the plaintiff's new spouse or girlfriend was seen wearing some of her clothes when she was taken to the home by the plaintiff. With averments or allegations like that, good evidence needed to be forthcoming from the plaintiff to show that the defendant is being less than honest or that all these averments are mere falsehoods.

42. The plaintiff seems completely convinced that the disputed property is his own because he is its sole registered proprietor. But when the court comes face to face with a situation where there is a home on the disputed property and one spouse is treating that home as matrimonial one, a lot of caution needs to be exercised before treating such property as belonging solely to one spouse. The law itself - see particularly Section 14 of the Matrimonial Property Act, 2013 - envisages that matrimonial property can be in the name of one spouse only. That is why care should be taken so that

one spouse is not short changed in the distribution of spoils that come during or after divorce or separation.

43. Let me comment briefly on other areas that impinge on the quality and/or merits of the plaintiff's case. One area relates to the plaintiff's averment at paragraph 15 of the plaint. According to the plaintiff, there is no pending case between him and the defendant over the same subject matter. That is repeated at paragraph 4 of the verifying affidavit that came with the plaint. Order 4 Rule (1) (f) of the Civil Procedure Rules requires that the plaintiff should make an averment in the plaint that there is no suit pending, in any court between himself and the defendant. Looking at the material laid before me, it is clear that the parties are not in court concerning this same property for the first time. There were rounds of litigation in Kyuso and orders favourable and unfavourable to the parties were issued by the Kyuso Court.

44. This matter was filed in 2023. In an interlocutory application filed contemporaneously with the suit, the defendant's response to that application also mentions some High Court matters including HCC Misc. Appl. E008/2023, Kitui, said to be pending at the time this matter was filed.

45. The fact that the plaintiff did not disclose all this to the court at the time he was filing the suit, seems to suggest to me that he was being less than honest and would probably choose not to disclose matters or things that were unfavourable to him. It behoved the plaintiff to know that the permanent order of injunction he is seeking is an equitable remedy and this kind of remedy requires full, honest, and unbiased disclosure, including disclosure of unfavourable court outcomes, so that the court dealing with the suit, sitting as a Court of Equity, can make an informed decision. The plaintiff was duty bound to make all these disclosures. It does augur well for him that he failed to do so.

46. The other area relates to the substance of the plaintiff's submissions. The main prayer sought by the plaintiff in this matter is a permanent injunction to stop the defendant from engaging in some injurious or wasteful dealings in the disputed land. The order sought is obviously in the nature of a prohibitory permanent injunction. In the plaintiff's submissions the circumstances or considerations in which such permanent injunction can be granted are similar to those for granting a mandatory injunction. The plaintiff is

incorrectly conflating these two different types of injunctions. The purpose of a permanent as sought by the plaintiff is to stop, restrict, restrain, prohibit, or prevent an actual or threatened wrong. In **Watson Wahome Njuru -vs- Co-operative Bank of Kenya Ltd. HCC No. 67 of 2006, Nyeri [2010] eKLR**, the court observed that to get this kind of injunction the plaintiff has to show that he has a legal right to protect and also that there is a probability of future serious injury.

47. In general, other considerations for granting this kind of injunction include whether the wrong complained of is likely to recur in future; whether there is an adequate alternative remedy; and whether the plaintiff has met other applicable equitable requirements that may affect his entitlement to an injunction.

48. The plaintiff did not address himself to all this. Instead, he shifted his focus to the requirements for granting a mandatory injunction. A mandatory injunction does not restrain, restrict or prevent. It commands or directs action. It is only granted in special circumstances; and in absence of such circumstances, the court will not normally grant it. The court

is usually willing to grant it for instance where the plaintiff's case is clear and straight forward. Here the court needs to be satisfied that such a case can be decided summarily or at once. The courts are usually less than enthusiastic, indeed sometimes they are even very strict, in issuing this kind of injunction. The plaintiff's approach was obviously wrong. He conflated two different kinds of injunctions and then adopted the wrong one as the basis of his submissions.

49. Ultimately, it can be seen that the outcome of this case is not very much based on how the defendant handled her own side of the case, but in the fundamental shortcomings in the plaintiff's own case clearly noticeable in its conceptualisation, formulation, prosecution, and legal analysis.

50. It may be useful to add that the other prayers sought by the plaintiff largely depend on whether his prayer for injunction is granted. Some others, like the one urging the court to order the defendant to drop using the name "*Mutua*" in her name, are obviously not for this court. It is something the plaintiff could have asked for in the divorce proceedings in U.S.A. Alternatively, he can possibly pursue the issue in the Family Division of the High Court here in Kenya.

51. Even assuming that the plaintiff could get the other orders, this is one order that he cannot get from an Environment & Land Court.

52. Ultimately, and in light of all the foregoing, I hold that the merits of the plaintiff's case have not been demonstrated. I therefore dismiss it.

53. As regards the issue of costs, the defendant would obviously want costs since the plaintiff's case has been dismissed. But I realise that the parties were once a lovely and loving couple who once shared nice times together. They are estranged now and probably, none would wish the other well. But nobody knows the future and given that the two have children together, they may not forever remain estranged. Granting the defendant costs in this matter is not proper in my view. This is a family matter. Each side should therefore bear its own costs.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **KITUI** this **26th day of FEBRUARY, 2026**.

In the presence of:

Lusweti for the plaintiff

Mandela (absent) for defendant

Kinyua Joel for Mandela for defendant

Court Assistant - Musyoki

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI