

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC NO. E008 OF 2022

SOLOMON KIPRUGUT
KOYOPEL-----PLAINTIFF

VERSUS

CHARLES LOMUKERANG-----
1ST DEFENDANT

THE CHIEF OFFICER, LAND & PHYSICAL PLANNING
WEST POKIT COUNTY-----2ND
DEFENDANT

JUDGMENT

1. The plaintiff approached the court through a plaint dated **3/2/2022**. He seeks:
 - (a) **Declaration that the acts of the 1st and 2nd defendants amount to trespass, and an eviction order does issue against them.**
 - (b) **Permanent injunction restraining the defendants from deliberating over, adjudicating, determining ownership, entering, developing, carrying out any further construction, fencing over, causing damage, or wanton acts of destruction, trespassing thereon, claiming ownership, or in any other manner dealing with Title No. West Pokit/Siyoi 'A'/372 (Kaibos), hereinafter the suit premises.**
 - (c) **Costs of the suit.**

2. The plaintiff contends that he is the registered owner of the suit land measuring approximately **16.8 acres**, vide a title deed issued to him on **4/1/1993**.
3. The plaintiff avers that the 1st defendant, who owns a plot at Kaibos Trading Center measuring **50 by 100 ft**, purchased from one Bernard Mnaibei, commenced construction of his plot in **December 2021**, by depositing building materials; unfortunately, he hived off part of the plaintiff's land.
4. The plaintiff avers that he immediately made a report or complaint to the police Kaibos, and also to the 3rd defendant, who issued a stoppage order. The plaintiff avers that to his chagrin, the 2nd defendant lifted the stoppage order on **21/12/2021**, and authorised the 1st defendant to proceed with the wanton acts of wastage, mayhem and destruction of the suit property by erecting a permanent structures thereon, in total breach of his right to peaceful, and quiet use, possession and ownership of his land, hence the prayers before the court since the 1st defendant is a trespasser on his land, determined to cause permanent damage on his land.
5. The 1st defendant opposed the suit through a statement of defence dated **15/3/2022**. The 1st

defendant denies that Plot No. **B1**, where he commenced construction, was hived off from a portion of the plaintiff's land as alleged or at all. Whereas the 1st defendant admits that reports or complaints were lodged with the police, and the 2nd defendant insists that the same were deliberated upon and found to be unfounded, hence their dismissal by the officers.

- 6.** The 1st defendant avers that following the dismissal of the complaint, the 2nd defendant, on **21/12/2021**, authorised him to continue with his construction on Plot No. **B1**, and the lifting of the stoppage order was merited. The 1st defendant denies that his construction works amount to wastage, destruction, trespass, mayhem, or permanent damage to the plaintiff's suit property. The 1st defendant terms the plaintiff's prayers in the plaint as lacking legal basis or merits, for he is entitled to develop[his own land, namely Plot No. **B1**.
- 7.** The 2nd defendant opposed the suit through a statement of defence dated **22/11/2022**, denying the contents thereof, save for paragraphs **2, 3, and 5** of the plaint and the contents of the letter dated **21/12/2021**. The 2nd defendant avers that parcel

No. **West Pokot/Siyoi 'A'/374**, which Plot No. **B1** forms part of, is reserved for Kiptany Trading Centre Kaibos, hence the suit discloses no cause of action against the 2nd defendant. Further, the 2nd defendant avers that the reliefs being sought by the plaintiff are untenable.

8. At the hearing, **Solomon Kiprugut Koyopet** testified as **PW1**. He relied on a witness statement dated **3/2/2022** as his evidence in chief. PW1 told the court that he is the registered owner of land Title No. **West Pokot/Siyoi 'A'/372** measuring **16.8 acres**, neighbouring the 1st defendant's plot at Kaibos center measuring **50 by 100ft** marked as Plot No. **B1**.
9. PW1 told the court that in **November 2021**, the 1st defendant, while intending to develop his plot, deposited building materials which spread across his land, to which he made a report to both the police Kaibos and the 2nd defendant, who issued a stoppage order against the 1st defendant. PW1 said that he was surprised that on **21/12/2021**, the 2nd defendant changed its mind and authorised the 1st defendant to continue with the construction of a permanent

structure touching on his land, yet he is a trespasser on his land.

- 10.** PW1 relies on exhibits, namely a letter dated **21/12/2021**, from the 2nd defendant, title deed, valuation report dated **13/9/1996**, survey sketch map, photographs, OB report, and official search certificate dated **14/12/2021** and **15/11/2004**, as **P. Exhibits No. (1), (2), (3), 4(a), (b), (c), (5),(6), (7), and (8)**, respectively. He termed the acts of the 1st defendant as amounting to encroachment of his land.
- 11.** PW1 told the court that, before moving to court, the police had investigated the matter; he was not aware if they had established there were no acts of trespass on his land by the 1st defendant, after a County Surveyor visited the disputed portion. PW1 said that he was not aware that the 1st defendant had bought his plot from one Regina, vide a sale agreement dated **24/9/2021**.
- 12.** PW1 termed **DMFI-(1)** as an attempt by the two parties to deal with his land without consent or authority. PW1 said that after he lodged his complaint with the 2nd defendant, a letter was written to the 1st defendant over the alleged trespass,

following which they held a meeting on **21/12/2021** where the issue was deliberated and a determination was made as per a report **DMFI-(3)** dated **21/12/2021**, which he disputed the contents since Plot No. **B1** cannot be inside his land, as belonging to the 2nd defendant. PW1 said that he has a report dated **20/1/2022**.

- 13.** Equally, PW1 said that after the court orders, a County Surveyor visited the land on **21/3/2024**, in the presence of the parties and prepared a report dated **17/4/2023**, marked **DMFI-(4)**. He insisted that the 1st defendant's plot couldn't be part of his land. PW1 said that he was not involved in the preparation of **DMFI-(4)**, hence the reason he instructed his lawyer to come up with a private surveyor's report. PW1 said that the map that the County Surveyor relied upon was different from what is on the ground, and that which was used by the Deputy County Surveyor to come up with a report dated **20/1/2022**, which clearly shows the extent of the encroachment of **17 meters** by **1.8 meters** after the 1st defendant tampered with the existing old beacons on the ground. PW1 said that the 1st

defendant bought the plot on **24/9/2021**, long after he had acquired his title for the suit land.

- 14. Pastor Benjamin Yatich** testified as **PW2**. He relied on a witness statement dated **3/2/2021** as his evidence-in-chief. PW2 said that it was the plaintiff who issued all the plots within the area, only for the 1st defendant to encroach on the suit property, as per the surveyor's report dated **20/1/2022**. He termed the 2nd surveyor's report as unauthentic.
- 15. Leah Chematosi Koyopel** testified as **PW3**. She relied on a witness statement dated **3/2/2021** as her evidence-in-chief. As a neighbour of the plaintiff, she said that she was privy to the boundaries in the vicinity and therefore it is the 1st defendant who had trespassed into the plaintiff's land, which initially belonged to their late father.
- 16.** PW3 said that though she was present in the meeting of **21/3/2024**, the county surveyors declined to follow the known existing beacons showing the correct boundaries. Equally, PW3 said that the county surveyor ignored all the input of the neighbours who were present during the meeting, hence making an erroneous report.

- 17. Charles Lomurerang** testified as **DW1**. He relied on a witness statement dated **15/3/2022** as his evidence in chief. DW1 told the court that he purchased Plot No. B1 Kaibos centre from Regina Naliaka Dickson on **24/9/2021**, who formally transferred the same to him at the County Government offices, where he paid **Kshs.3,000/=** for the transfer.
- 18. DW1** said that after the purchase, the seller and her sons showed him the boundaries, which had been fixed with posts since **1972**. DW1 said that the plot had been set aside by the county government for public utilities as Plot No. **B1-B11**. DW1 said that he commenced construction of a commercial building on the plot, only for the plaintiff in **December 2021** to complain to the 2nd defendant about an alleged encroachment of his land.
- 19.** DW1 said that he was through a letter dated **12/12/2021** summoned to the 2nd defendant's offices, where all the parties were in attendance, and after deliberations, the 2nd defendant found that there was no trespass by him to the plaintiff's land, hence he was given a go-ahead to resume his construction works. DW1 relied on a copy of the sale

agreement dated **24/9/2021**, receipt dated **24/9/2021**, letter dated **21/12/2021**, survey reports dated **17/4/2024**, and letter dated **14/12/2021**, as **D. Exhibit No. (1), (2), (3), (4), and (5)** respectively.

- 20.** DW1 said that his plot is No. **B1** Kaibos Centre, which he took possession of in **September 2021**, was previously owned by Dickson Malinda as the 1st allottee. DW1 said that though the record of allocation was not clear, he had been informed that the plot was allocated in **1972**. DW1 could not confirm if the initial owner of the land was the plaintiff's late father, who had surrendered his entire land to the defunct county council.
- 21.** DW1 said that other than the transfer fees and the sale agreement, he had no transfer form signed by the parties and the initial owner, who is now deceased. DW1 said that they had no allotment letter before the court. DW1 said that it is the widow of the initial owner who sold him the land. DW1 said that the said Regina Naliaka was also deceased.
- 22.** DW1 said that the seller had no letters of administration or acting with an authority as a next of kin during the sale. DW1 said that he did not

engage a county surveyor when the beacons were shown to him by the seller and her son(s). DW1 said that the surveyor came to identify the measurements and beacons much later, after the suit was filed against him.

- 23.** DW1 said that it is not true that he commenced construction contrary to the existing beacons on the ground. DW1 disputed the contents of the surveyor's report dated **20/1/2022** as regards the alleged access road. DW1 said that he bought Plot No. **B1** from Regina Dickson.
- 24.** The record shows that the 2nd defendant did not attend the hearing despite service with a hearing notice. Its defence was therefore marked as closed.
- 25.** The plaintiff relies on written submissions dated **23/1/2026**. He submits that he has proved his case on a balance of probability as the beneficial owner and proprietor, entitled to immediate possession of the suit property. Further, that the 1st defendant is a trespasser and not an innocent purchaser for value, having settled without a surveyor, took advantage thereof by overstepping the boundaries. Reliance is placed on **Sections 107** of the Evidence Act, **Sections 24, 25, and 26** of the Land Registration

Act, **Sections 3, 4, 5, 6, and 8** of the Trespass Act, **Section 152** of the Land Act, **Embakasi Properties Limited & another -vs- Commissioner of Lands & another [2019] eKLR, La Nyavu Gardens Limited -vs- Wilson Munguti Mbithi alias Kavuti & 2 Others, (2012) EKLR**, and *Clerk and Lindsell on Torts, 18th Edition at paragraph 18 - 01.*

- 26.** Reliance is placed on **Sections 107** of the Evidence Act, **Sections 24, 25, and 26** of the Land Registration Act, **Sections 3, 4, 5, 6, and 8** of the Trespass Act, **Section 152** of the Land Act, **Embakasi Properties Limited & another -vs- Commissioner of Lands & another [2019] eKLR, La Nyavu Gardens Limited -vs- Wilson Munguti Mbithi alias Kavuti & 2 Others, (2012) EKLR**, and *Clerk and Lindsell on Torts, 18th*
- 27.** On his part, the 1st defendant relies on written submissions dated **1/12/2025**. It is submitted that the plaintiff has not been able to prove any trespass to his land by the 1st defendant going by the county surveyor and physical planner's visit on **21/12/2024**, and the report produced before the court as **D. Exhibit No. (4)**. Reliance is placed on **Meru ELC**

Appeal No. E081 of 2024, John Kinyua Gitari - vs- Duncan Mwenda & Others.

28. The court has carefully gone through the pleadings, evidence tendered, and the written submissions. The issues calling for determination are:

(1) If the plaintiff has proved trespass or encroachment of the Land Title No. West Pokot/Siyoi 'A'/372 Kaibos.

(2) If the 1st defendant owns Plot No. B1 Kaibos.

(3) If the 1st defendant was justified in developing and or constructing Plot No. B1 measuring 50 by 100ft to the extent of encroaching onto the plaintiff's suit property.

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

(5) What is the order as to costs?

29. Section 107 of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability depended on the existence of facts which he asserts must prove that those facts exist. **Section 116** of the Evidence Act provides that where a question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

- 30. Article 40** of the Constitution entitles every person to the right to property. **Article 40(6)** thereof limits those rights where the property is found to be unlawfully acquired. In **Funzi Island Development Ltd & 2 Others -vs- County Council of Kwale & Others [2014] KECA 882 [KLR]**, the court said that in the case of allocated land, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper, and regular.
- 31.** In **Pati Ltd -vs- Funzi Island Development Ltd & Others [2021] KESC 29 [KLR]**, the court held that the entire process and notice for setting apart fell short of the requirements of the Constitution and the law, making the status of the suit land illegal.
- 32.** In **General & Another -vs- Hussein & Others Civil Appeal No. 100 [2025] KECA 1022 [KLR] (5th June 2025) (Judgment)**, the court said that the law of evidence revolves around two cardinal things: facts and proof. The court cited **Nelson Kagunza Chai & Others -vs- Pwani University [2014] eKLR**, that under the repealed Government Land Act, a Part Development Plan (PDP), must be drawn and approved by the Commissioner of Lands or the Minister before any unalienated government land can

be allocated, and that after a PDP is drawn, a letter of allocation based on the approved PDP is issued to the allottees.

- 33.** The court also cited **African Line Transport Co. Ltd -vs- Attorney General & Others [2007] eKLR**, that planning comes first, then surveying. The court cited **Korir -vs- Njoki [2023] KECA 439 [KLR]**, **Elizabeth Wanjiru Githinji & Others -vs- KURA [2019] eKLR**, **Munyu Maina -vs- Hiram Gathiha Maina [2013] KECA 94 [KLR]**, that where a registered property's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership without going behind the instrument to show that the acquisition of the title was formal, legal, and free of any encumbrances, including those not noted in the register.
- 34.** Following from the foregoing, it is clear that a title document is not sufficient proof of ownership or property where the origin of that title has been challenged. The title holder before the court of law must therefore show that the process of acquisition from inception was both legal and procedural. A purchaser for land has a duty to conduct due

diligence to establish the root of title to fit within the definition of a bona fide purchaser for value without notice.

35. In Said Shune & Others [2024] KECA 866 [KLR],

the court said that lands are not vegetables which are bought from unknown sellers, and are therefore valuable properties where buyers are expected to make thorough investigations not only on the land but also the owner before the purchase.

36. In Dina Management Ltd -vs- County Government of Mombasa [2023] KESC 30 [KLR],

the court held that once the root of title is challenged, a party cannot derive benefit from the doctrine of innocent bona fide purchaser. Further in

Sehmi -vs- Tarabana Co. Ltd & Others Petition

No. E033 of 2023, the court said that to qualify as a bona fide purchaser for value without notice, a claimant has to prove innocence, purchaser for value, a legal estate, and due diligence. The court said that the doctrine of innocent purchaser for value without notice cannot protect a purchaser of an illegally or irregularly allocated title to public land.

37. Additionally, where two claimants claim one piece of land, each must bring before the court tracing

ownership documents for the court to interrogate the route each took to obtain title to the land. Each to succeed must therefore present an unbroken chain of documents which are capable of persuading a judicial mind on preponderance of probabilities, that it is more probable than not that he or she is the beneficial or bona fide owner of the land. See **Caroline Awinja Ochieng & Another -vs- Jane Anne Mbithe & Others [2015] eKLR.**

- 38.** In this suit, the plaintiff has produced a title deed which was issued on **4/1/1993**, under Registry Map Sheet No. **38**, and a survey report.
- 39.** In the valuation report produced as **P. Exhibit No. (3)** and **(4)**, there is evidence that the Registry Index Map was used to trace the measurements on the ground. There is no evidence on the title deed that the County Government of West Pokot placed a restriction on the title based on alleged public land on account of reservation.
- 40.** The 1st and 2nd defendants allege that Plot No. **B1** was allocated to the 1st defendant as part of public utility plots falling under reserved public land. The 1st defendant relies on **D.Exhibit No. (1)** dated **24/9/2022**. The sale agreement does not define the

coordinates, measurements, or the locality of the plot. It does not state the registration status of the plot under any legal regime. There is no evidence that the 1st defendant had, before the sale agreement, undertaken any due diligence with the County Government of West Pokot to ascertain the registration status, the registered owner, date of allocation, or payment of land rates.

41. D. Exhibit No. (3) was not accompanied by any historical data to show when the reservation was made, who was the 1st allottee, evidence of allotment, minutes for the allocation, beaconing of the plot, pegging of the plot, evidence of allotment, registration, payment of land rates, and copies of the plot register since **1978**.

42. D. Exhibit No. (3) and (4) were not produced by the makers to provide the court with all the above-referenced supporting documents to substantiate the assertion that Plot No. **B1** exists in any known official documents on land ownership belonging to the 2nd defendant. The 2nd defendant did not attach a copy of any witness statements and a list of documents alongside the statement of defence dated **22/11/2022**.

- 43.** The concept of setting a part of the plaintiff's land is what the defendants alleged in their defence as a basis of challenging the title to the suit property as illegally or irregularly obtained. There was no evidence tendered by the 1st and 2nd defendants to show when the setting apart was in line with **Sections 114 - 116** of the retired constitution and the repealed Trust Land Act and the Land Adjudication Act.
- 44.** Setting apart of trust land was an intricate process. Evidence of a county council meeting, preparation of a PDP under Section 16 of the repealed plan, gazettelement of the plan, and approval of the same by the Director of Physical Planning, cadastral survey of the same, approval of the District Surveyor, and allocation of a Land Reference of Plot No. **B1** are the documents that the defendants should have availed to sustain their defence.
- 45.** Plot No. **B1** has no PDP number. It was not accompanied by any allotment letter to the former alleged owner or seller of the land to the 1st defendant. A PDP would show the suit property in relation to the neighbouring parcels of land. In **Torino Enterprises Ltd -vs- Attorney General**

[2023] KESC 79 [KLR], the court said that an allotment letter, as held in **Dr Joseph Ng'ok -vs- Moijjo Ole Keiuwa CA No. 60 of 1997**, is a mere invitation to treat, which cannot confer an interest in land.

- 46.** There is no evidence that the seller of the plot to the 1st defendant had a better title. One cannot offer for sale what he does not own in the first instance. The doctrine of *nemo dat quod non habet* applies in this case. Due diligence required the 1st defendant to establish and verify not only ownership, but also the plot status in relation to the plaintiff's title deed, falling within a known and established RIM.
- 47.** One cannot acquire property rights over another's property other than in a manner prescribed in law. Town plots are acquired through a legal process. There is no evidence that before the 1st defendant bought the plot, he sought the county surveyor and planners to trace the existence of the plot in their land records. The 1st defendant has not even produced before this court any approved building plans from the County Government of West Pokot authorizing him to erect buildings on Plot No. **B1**. A right can only be protected when it exists in reality

and not where it remains an illusion, or where there are expectations.

- 48.** The sale agreement on which the 1st defendant relies was not executed by the head lessor; if at all, the 2nd defendant owns the land as reserved public property. There is no evidence that the 1st defendant sought the approval of the County Government to transfer the plot, and in which case there will be minutes for the approval of the sale and transfer.
- 49.** The 1st and 2nd defendants alleged that the land was surrendered by the plaintiff's late father and became public land. **Sections 24 - 28** of the repealed Physical Planning Act would then have been invoked by the defunct county council. Evidence of compliance is missing. **Sections 11 -16** of the repealed Government Land Act related to the disposal and or allocation of town plots.
- 50.** There is no evidence tendered by the 1st defendant on when the leases were advertised, sold, the place and time of the sale, the number of the plots, the situation of each plot, upset price, county surveyor fees paid, term of the lease, rent payable, and lastly building conditions and special covenants.

- 51.** In view of the foregoing, my finding is that the plaintiff has proved ownership of the suit property, which the defendants have been unable to impeach on account of the alleged reserved land.
- 52.** Coming to trespass, it refers to the violation of the right to use, occupy, or possess private land without the consent or authority of the owner or justification. See **KPLC -vs- Ringera [2022] KECA 204 [KLR]**. To succeed in a claim of trespass, a plaintiff has to prove that he had the right to immediate and exclusive possession of the land, which had been wrongfully violated by the defendant. See **M'Kiara M'Mukunya -vs- M'Mbijiwe [1984] eKLR** and **Margaret Iminza Luyayi -vs- Moses Opundo Mudaka [2014] eKLR**.
- 53.** In **Ochako Obincho -vs- Zachary Oyoti Nyamongo [2018] KEELC 3418 (KLR)**, the court cited *Clark & Lindsell on Torts 18th Edition page 923*, that the onus is on the plaintiff to prove that he was the owner of the suit property and that the defendant had invaded and occupied the same without justifiable cause.
- 54.** In this suit, the plaintiff has tendered a title deed as conclusive proof that he is the absolute owner of the

suit property since **1993**. The 1st defendant admits that he has made an entry into and erected a permanent structure within the plaintiff's land based on the alleged purchaser of the Plot No. **B1** from the late Regina Naliaka on **24/9/2021**.

- 55.** The 1st defendant failed to call the officers of the county government of West Pokot alleged to be the allocating authority of the plot. **D. Exhibit No. (1) - (5)** do not in any way, as indicated above, prove that Plot No. **B1** is part of the reserved public land. The title held by the plaintiff has no restriction registered against it in relation to the alleged reserved plots allocated to the 1st defendant by the county. The 1st defendant has no approved building plans by the county government in relation to the plaintiff's land.
- 56.** The 1st defendant had no justification to enter, commence, and erect structures on the plaintiff's land without first ascertaining the boundaries, measurements, and beacons for his plot and, above all, the ownership status of Plot No. **B1** vis-à-vis registered land owned by the plaintiff. The plaintiff took the initiative of reporting the matter to both the police and the 2nd defendant. Instead of the 1st defendant availing ownership documents or the 2nd

defendant supplying the plaintiff with evidence of the alleged reserved plots within his titled land, the 2nd defendant unilaterally and without justification in law gave the 1st defendant a go-ahead to continue with acts of trespass and construction of illegal and unapproved buildings on the plaintiff's land.

- 57.** Trespass is actionable per se without proof of any damages. See **Duncan Nderitu Ndegwa -vs- Kenya Pipeline Company Limited & another [2018] eKLR**. A court of law has powers to grant a permanent injunction. It is granted where a court has fully determined the rights of the parties. It is meant to perpetually restrain the commission of an act by the defendant for the rights of the plaintiff to be protected.
- 58.** In this suit, the 1st defendant, with the go-ahead of the 2nd defendant have threatened, infringed, or violated the plaintiff's ownership rights of the suit property. The court finds that the plaintiff has proved his claim to the required standards.
- 59.** The court proceeded to grant orders as hereunder;
- a) A declaration be and is hereby issued that the acts of the 1st and 2nd defendants amount to trespass and are ordered to vacate Title No. West Pokit/Siyoi 'A'/372 (Kaibos), within**

90 days, in default of which they shall be evicted in line with the law.

b)An order of permanent injunction is hereby issued restraining the defendants from deliberating over, adjudicating, determining ownership, entering, developing, carrying out any further construction, fencing over, causing damage, or wanton acts of destruction, trespassing thereon, claiming ownership, or in any other manner dealing with Title No. West Pokit/Siyoi 'A'/372 (Kaibos).

c) Costs of the suit.

d)General damages for trespass of Kshs. 5,000,000/=.

60. Orders accordingly.

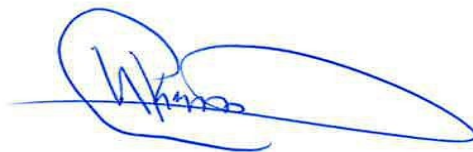
Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 24th day of March 2026.

In the presence of:

Court Assistant - Dennis

Keya for Wanyonyi for plaintiff

Miss Arunga for the 1st defendant



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