



**Mwangi (Suing as the Legal Representative of the Estate of George Mwangi  
Kibiru - Deceased) v Njagi & another (Environment and Land Case  
48 of 2023) [2025] KEMC 349 (KLR) (4 December 2025) (Judgment)**

Neutral citation: [2025] KEMC 349 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
ENVIRONMENT AND LAND CASE 48 OF 2023  
PA NDEGE, SPM  
DECEMBER 4, 2025**

**BETWEEN**

**BETHUEL MUTURI MWANGI ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE  
MWANGI KIBIRU - DECEASED**

**AND**

**DAVID KIMANI NJAGI ..... 1<sup>ST</sup> DEFENDANT  
TABITHA NYAMBURA WAITHANJI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgement of this Honorable Court pertains to the suit instituted by Plaintiff, Bethuel Muturi Mwangi, vide a Plaint dated 07<sup>th</sup> March 2023. It was against the Defendant. It is instructive to note that the Summons to Enter Appearance dated 08<sup>th</sup> March, 2023 and pleadings were properly served in accordance with the contents of an 11 Paragraphed Affidavit of Service dated 29<sup>th</sup> September, 2023 sworn by Pius Murichu Waichigo, a licensed process server. Despite of this, there was no Defence filed as required under the provision of Orders 5 and 7 of the Civil Procedure Rules, 2010. Thus, it follows that the suit was unopposed. But being a land matter, and guided by the provision of Order 10 Rules 4, 5, 6, 7 9 and 10 of the Civil Procedure Rules, 2010, it proceeded as an ex-parte hearing for the plaintiff's case.

**II. Plaintiff's case**

2. From the filed pleadings, the Plaintiff has instituted this suit as the Legal Representative of the Estate of George Mwangi Kibiru (Deceased) who was and still is the registered owner of all that parcel of



land known as L.R. Nakuru/Rwangondu/45 measuring approximately 3.7 Hectares (Hereinafter referred to as ‘The Suit Property’). It was the Plaintiff’s case that the Defendants, who are husband and wife respectively, without any consent and or authority entered upon the suit parcel and illegally put up temporary structures and started farming on the suit property in blatant breach of the Plaintiff’s proprietary rights and interest in the property.

3. According to the Plaintiff, despite the demand for the defendants to vacate this suit property, the defendants have refused, declined and/or neglected to vacate the suit property and instead filed MCELC No. 1 of 2019 at this court claiming ownership of the suit property which suit was dismissed vide judgment delivered on 06/05/2021. That the defendants therefore remains in the suit property unlawfully, illegally and as trespassers without any color of right or interest in the said property.
4. The Plaintiff prayed for Judgement to be entered against the Defendants for: -
  - a. A permanent injunction restraining the Defendants by themselves, agents, servants, employees or anybody claiming under them from interfering in any way, developing, constructing, alienating, farming and/or in any other way dealing with the suit property.
  - b. Vacant possession of the suit property
  - c. Eviction of the Defendants from the suit property
  - d. Damages for trespass
  - e. Mesne profits
  - f. Costs of the suit and interest

### **III. The Evidence adduced by the Plaintiff.**

5. As already indicated above, the case by the Plaintiff proceeded as an undefended under the provision of Order 10 Rules 4, 5, 6, 7, 9 and 10 of the Civil Procedure Rules, 2010. From the proceedings of 27/03/2025 before court, it was indicated, and the court found, that the defendants were properly served. They acknowledged service by writing their names, signing and writing their respective national identity card numbers on the return copies of summons. Indeed, they have since instructed an advocate who belatedly filed a Memo of Appearance and a Joint Statement of Defence on their behalf on 15/10/2025 after the close of hearing.
6. In the given circumstances, it was only the Plaintiff who testified as PW1. The witness testified on oath in the English language. He identified himself as Bethwel M. Mwangi, son to the deceased and currently staying in Nairobi. He then adapted his statement filed and admitted herein as PEXH. No. 1 as his chief testimony herein. in the statement, he narrated how his late father bought this parcel of land from one Joseph Rurigi Wanjohi in the year 1987. That the suit property was then later registered in his name and issued with title deed on 20/01/2015 after making the requisite payments including stamp duty. He produced the title deed as PEXH. No. 12. That all along the suit property was vacant as his late father had already been given vacant possession when he purchased the property. That often times, he accompanied his late father to the suit property during the times he was pursuing the issuance of title deed and he is therefore aware that the suit property was vacant. That sometimes in 2017, the Defendants herein without any color of right and without their knowledge and consent, encroached and trespassed on the suit property, set up some temporary structures and planted some crops. That he reported the trespass to the area chief who summoned the Defendants for a meeting which they all attended including his late father and his mother. That the Defendants admitted trespassing on the suit parcel and requested to be allowed to harvest what they had planted and vacate the land



immediately after harvesting. That as they waited the harvest, his late father was suddenly served with summons in Nakuru ELC No. 163 of 2018 which was later transferred to the Chief Magistrate's Court as MCELC No. 1 of 2019 in which the defendants were claiming ownership of the suit property. That the case was heard and judgment delivered on 06/05/2021 dismissing the Defendants claim. That to date the defendants have refused, neglected and/or failed to vacate from the suit property and have continued with their illegal occupation of the land and trespass. That as a result, the Estate of their late father has suffered and continues to suffer loss and they have been denied the use of the suit property. Thereafter, the Plaintiff's case was marked as closed and directions were given that plaintiff files his written submissions.

#### IV. Submissions

7. The Plaintiff through the Law firm of Kangethe Waitere & Co Advocates filed his written submissions dated 22/09/2025. Learned counsel commenced the submission by recounting the background details of the Plaintiff's case based on the filed pleadings herein. The Learned Counsel identified the following issues for determination: -
  - a. Whether the Plaintiff has established ownership rights to and in respect of the suit property,
  - b. whether the Defendants continued occupation of the suit property constitutes trespass,
  - c. whether the plaintiff is entitled to the prayers sought, and
  - d. who pays costs of the suit.
8. On the first issue of determination as framed, the Learned Counsel submitted that it was not in dispute that the Plaintiff's late father was the registered owner of the suit property. To buttress on this point, the Plaintiff referred Court to the provisions of Sections 24(a) of the Land Registration Act No. 3 of 2012.
9. The Plaintiff further submitted that the Defendant had continuously trespassed on the suit property by continuing to occupy the suit property since 2017 without their consent and/or permission. He referred the court to the case of *Musau vs Mutata & Another (2023) KEMC 109 (KLR)*<sup>1</sup> where the court stated: -

The general meaning of trespass can be gathered from sections 3, 4, 5, 6 and 8 of the Trespass Act. Gathering from the said section, it amounts to trespass if any person unlawfully without a reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on that land without the consent of the proprietor.
10. That it is actually not in dispute that the defendants entered the suit property in 2017 and have remained on the suit property to date without any reasonable excuse or justification and without the consent and permission of the plaintiff. That indeed, after the decision of the court in MELC No. 1 of 2019, that held that the defendants herein had not established any interest or rights in the suit property, the defendants had absolutely no reasonable excuse and/or justification to remain on the suit property and their occupation now amounts to trespass. That upon proof of trespass the plaintiff is therefore entitled to the reliefs sought.

<sup>1</sup> A lower court decision, which however has a persuasive value



11. Learned counsel appears to have deliberately avoided submitting for mesne profit. On the measure of the general damages for trespass, he relied on the case of *David Kumugen Koskei vs Benjamin Tuwel & Another* (2019) eKLR where the court stated as follows:

On the issue of general damages for trespass, it is trite law that trespass to land is actionable per se (without proof of any damage). See the case of *Park Towers Ltd Vs John Mithamo Njika & 7 others* (2014) e KLR where J. M. Mutungi stated;

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

12. That the blatant refusal by the defendants to vacate the suit property has caused the estate of the deceased gross injustice since the defendants continue to unlawfully enjoy the uses of the suit property to the detriment of the estate which has been denied use of the suit property for 8 years. In the circumstances, counsel proposed an award of Kshs. 1,000,000/- as reasonable in the circumstances.

## VI. Analysis & Determination

13. I have keenly assessed the Complaint and documents filed by the Plaintiff herein, the written submissions, the authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes. For the Honorable Court to reach an informed, Equitable and fair decision, it has condensed the subject matter into the following three (3) salient issues for its determination. These are namely: -
- a. Whether the suit instituted by the Plaintiff against the Defendant has any merit whatsoever?
  - b. whether the Plaintiff is entitled to the orders sought?
  - c. who bears the costs of suit?

### Issue No. a). Whether the suit instituted by the Plaintiff against the Defendant has any merit whatsoever?

14. Under this Sub – title, the Honorable Court will endeavor to assess whether the Plaintiff has been able to establish his case based on all the required legal standards. It is instructive to note that although the suit was undefended, the Plaintiffs had a duty to formally prove their case on a balance of probabilities as it is required by law. Particularly, on this front, the Court is guided by the doctrine of ‘the Burden of Proof’ which is founded under the provision of Sections 107, 108 and 109 of the *Evidence Act*, Cap. 80 of the Laws of Kenya whereby it is the Plaintiff to prove his case. They provide as follows: -

Section (107); Burden of proof.

- (1); Whoever desires any court to give Judgement as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exists.
- (2); When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section (108); Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section (109); proof of particular fact.



The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence. Unless it is provided by any law that the proof of fact shall lie on any particular person.

15. On this ground, I seek solace from the case of *Kirugi and Another vs Kabiya & 3 others* (1987) KLR 347 where the Court of Appeal held that: -

The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.

16. Similarly, in the case of *Gichinga Kibutha – Versus - Caroline Nduku* (2018) eKLR the Court held that: -

It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.

17. Undoubtedly, the ownership of the suit property has not been an issue before the Court. Indeed, the Plaintiff has produced before court a copy of the title deed to the suit property herein demonstrating that the deceased is the legal and absolute registered proprietor of the suit land with indefeasible right, interest and title vested in law. These are anchored under the provision of Sections 24, 25 and 26 of the [Land Registration Act](#), No. 3 of 2012. The provision of Section 24(a) of the [Land Registration Act](#), No. 3 of 2012 provides for the interest conferred by registration. It provides: -

Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.

18. The provision of Section 26 (1) of the [Land Registration Act](#), No. 3 provides as follows:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party or;
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

19. As thus may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

20. From the uncontroverted evidence adduced herein, I find nothing to challenge the deceased's title herein. It is clear that the disputed land belongs to the deceased as was explained by the evidence in by the plaintiff and the documents adduced. He narrated how the land was acquired and subsequently registered.



**Issue No. b). Whether the Plaintiff is entitled to the relief sought**

21. From the filed pleadings, the Plaintiff has sought for mesne profits and damages for trespass from the Defendant. In the given circumstances, the Court will be assessing each of these reliefs separately. The provision of Section 2 of the Civil Procedure Act Cap. 21 Laws of Kenya defines Mesne Profits as follows: -
- “Mesne Profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;
22. Simply put, mesne profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates. It must be pleaded and proved. There was however no figure pleaded and no evidence was adduced to that extent herein. No wonder the plaintiff did not submit on it. Mesne profit is thus not awardable herein.
23. I reiterate that the Plaintiff having produced a title document, I hold that the plaintiff has proved his case to the required to warrant the grant of permanent injunctive and other related orders sought. Consequently, I will proceed to find that the Defendants either by themselves, agents, servants, employees and /or anyone claiming under them should be permanently restrained from interfering in any way, developing, constructing, alienating, farming and/or in any other way dealing with the suit property. I further order the defendants to give vacant possession of the suit parcel herein, and if not, they be forcefully lawfully evicted upon lapse of 90 days.
24. On the issue of whether the Plaintiff is entitled to General Damages as sought. From the foregoing, it is clear that the Plaintiff is the absolute, rightful and indefeasible owner of the suit property herein, and I have also held that the Defendants are guilty of encroaching and trespassing onto the Plaintiff's land. The said trespass denied the Plaintiff use, occupation, possession and enjoyment of said land. The Defendants on the other side have been using and enjoying the use of the unlawful actions. It is this loss of use and all the incidental rights that have been infringed by the Defendants that the Plaintiff now seeks compensation for.
25. In the case of *Duncan Nderitu Ndegwa – Versus - KP& LC Limited & Another* (2013) eKLR P. Nyamweya J. held that: -
- ... once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants trespass
26. In this case the Plaintiff has not provided this court with the value of the suit property herein. The land parcel herein however measures 3.7 Hectares and the defendants have been occupying and utilizing it for the past 8 years. I therefore do find that the Kshs. 1,000,000/- proposed by the plaintiff as general damages to be reasonable. Therefore, based on all the surrounding facts and inferences of this case, the court will proceed to award the Plaintiff a sum of Kenya Shillings One Million (Kshs. 1,000,000/=) as the nominal award of general damages in this case taking into consideration the duration of the trespass.



**Issue No. c). Who will bear the costs of the suit?**

27. It is well established that the issue of costs is at the discretion of the Court. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 provides that costs follow the event. In the instant case, the Plaintiff herein has successfully managed to establish his case. Thus, he is entitled to the costs of the suit.

**VII. Conclusion & Disposition**

28. Ultimately, upon causing intensive analysis of the framed issues herein, the Honorable Court based on the principles of Preponderance of Probabilities and the balance of convenience, holds that the Plaintiff has been able to prove his case. For avoidance of doubt therefore, the Court proceeds to grant the following orders: -

- a. That Judgment be and is hereby entered in favour of the Plaintiff against the Defendant as prayed in the filed Plaintiff dated 07/03/2023.
- b. That an order of permanent injunction does issue restraining the Defendants either by themselves, agents, servants, employees and /or anyone claiming under them from interfering in any way, developing, constructing, alienating, farming and/or in any other way dealing with the suit property.
- c. An order for the defendants to give vacant possession of the suit parcel herein, and if they fail, they be forcefully lawfully evicted upon lapse of 90 days.
- d. That an order made to have the Defendant pay the Plaintiff a sum of Kenya Shillings One Million (Kshs. 1,000,000/=) as general damages for trespass.
- e. That the Plaintiff's prayer for mesne profits be and is hereby declined.
- f. That the costs of the suit be awarded to the Plaintiff.

It is ordered accordingly.

**JUDGEMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS,  
SIGNED AND DATED AT NAKURU THIS 04<sup>TH</sup> DAY OF DECEMBER, 2025**

**HON. ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

Judgement delivered in the presence of: -

Advocate for the Plaintiff: N/A

Plaintiff: N/A

