



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Salesians of Don Bosco Registered Trustees v David & 4 others (Civil Case 127 of 2021) [2025] KEELC 5549 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5549 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL CASE 127 OF 2021**

**LL NAIKUNI, J
JULY 25, 2025**

BETWEEN

THE SALESIANS OF DON BOSCO REGISTERED TRUSTEES PLAINTIFF

AND

MUKURU DAVID 1ST DEFENDANT

SAFARI CHENGO NYAMU 2ND DEFENDANT

NZINGO KATANA GONA 3RD DEFENDANT

KATANA KAHINDI NG'AMBO 4TH DEFENDANT

FLORENCE MALEMBA MWAZIGHE 5TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to the instituted suit through the Complaint dated 1st July, 2021 and filed on 5th July, 2021 by The Salesians of Don Bosco Registered Trustees, the Plaintiff herein. It was against Mukuru David, Safari Chengo Nyamu, Nzingo Katana Gona, Katana Kahindi Ng'ambo and Florence Malemba the Defendants herein.
2. Despite of the pleading and summons to enter appearance through substituted means under the provision of Order 5 Rule 17 of the Civil Procedure Rules, 2010 by publishing an advertisement in one of the local dailies "The Standard" newspaper of 22nd October, 2021, of wide national circulation, the Defendants never entered appearance nor filed their Statement of Defence as required by Law – Order 7 of the Civil Procedure Rules, 2010. There was filed affidavit of service sworn and dated on 8th November, 2021 to that effect. Hence the matter proceeded on formal proof in accordance with the provision of Order 10 Rules 4, 5, 6, 7, 9 and 10 of the Rules hereof.



II. Description of the Parties in the suit

3. The Plaintiff was described as an entity and a trustee capable of suing and being sued. Operating within the Republic of Kenya.
4. The Defendants were described as female and male adult residing and working for gain in Mombasa County within the Republic of Kenya.

III. Court directions before the hearing

5. Nonetheless, on 11th April, 2024, the Honourable Court fixed the hearing dated on 15th July, 2024 with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for formal proof hearing on 15th July, 2024 by way of adducing “viva voce” evidence with the Plaintiff’s witnesses testifying in Court whereby they closed their case on 11th November, 2024.

IV. The Plaintiff’s case

6. From the filed pleadings, at all material times relevant to this suit, he was and still is, the registered proprietor of all that property Plot Number L.R. 1866/I Mainland North. (Hereinafter referred to as “The Suit Property”) within the County of Mombasa. The suit property was originally owned by Anthony Praxedes D’Costa and caused the same to be transferred to the Plaintiff as a gift Certificate of Title on 24th August, 2011. Since it took over proprietorship of the suit property, it had complied with all the special conditions from paying all the land rates and/or rents as and when due to the relevant government authorities. The Plaintiff further stated that it had peaceful occupation and enjoyment of the suit property until some times in August 2012 when the Defendant without the Plaintiff’s authority or consent, forcefully and wrongfully entered and illegally took possession of the suit property, remained therein and had erected permanent structures thereon from which the Defendants conducts business.
7. The Plaintiff stated that the Defendants’ illegal entry into the suit property amounted to trespass, particulars which were itemized as follows: -
 - a. Illegally and without any unjustifiable cause, entering into, occupying and continuing in occupation of the Plot Number L.R. 1866/I/Mainland North knowing or having reasons to know that the suit property belonged to the Plaintiff;
 - b. Illegally and without any unjustifiable cause, entering the suit property and harassing, threatening and using the area jurisdictional police to intimidate the Plaintiffs;
 - c. Illegally erecting temporary and permanent structures on the suit property knowing or having reasons to believe that the suit property belonged to the Plaintiff; and
 - d. Illegally remaining on the suit property.
8. According to the Plaintiff, the Defendants had since their illegal entry into the suit property as explained above, harassed, threatened, and on had completely locked the Plaintiff out of the suit property, thereby restricting his ingress and exit. As a result of the Defendants’ wrongful occupation of the suit property, the Defendants had, misused, damaged, wasted, cut down trees, destroyed and degraded the suit property with the result that the Plaintiff had been deprived of the use and enjoyment of the suit property.
9. The Plaintiff relied on the following particulars of loss/damages sustained by the Plaintiff: -



- a. The Plaintiff had been deprived of the use and quiet enjoyment of the suit property;
 - b. The Defendants had prevented the Plaintiff from freely accessing the suit property to carry on cultivation and other benefits arising therefrom;
 - c. The Defendants had threatened the Plaintiff and his agents with physical violence whenever the plaintiff or his agents attempt to enter the suit property to work on it or derive benefits accruing from the suit property; and
 - d. The Defendants' erection of permanent houses and cutting down of trees and grass among others on the suit property is an eye sore and has therefore defaced and devalued the suit property.
10. As the absolute proprietor of the suit property, the Plaintiff averred that he was entitled to enjoy all the rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third parties under the provision of Section 24(b) of the *Land Registration Act*, No. 3 of 2012. The Plaintiff reported the illegal entry into his suit property to the area jurisdictional police but the authorities took no action. The Plaintiff further averred that in the circumstances, it has no other alternatives or efficacious remedy other than to approach this honourable court for the protection of his proprietary rights to the suit property.
11. The Plaintiff's cause of action against the Plaintiff was a permanent injunction against the Defendants for illegal trespass, including an order for damages for the loss sustained out of the illegal trespass to the suit property. The Plaintiff further stated that despite the demand and notice of intention to sue being served upon the Defendants, the Defendants had refused, ignored and/or neglected to make good the Plaintiff's claim hence this suit. The Plaintiff stated that there was no suit pending and that there had been no previous proceedings in any Court between the Plaintiff and the Defendants over the subject property. The suit property was situated in Mombasa County within the jurisdiction of this Honourable Court.
12. The Plaintiff sought for Judgment be entered against the Defendants jointly and severally for;
- a. A declaration that the Defendants' actions of unauthorised entry into the Plaintiffs Plot Number L.R. 1866/I Mainland North, continued occupation, and constructing permanent structures thereon amounts to trespass, therefore illegal, null and void.
 - b. A permanent injunction restraining the Defendants, whether by themselves or his servants/agents/employees from remaining on or continuing in occupation of Plot Number L.R. 1866/I Mainland North.
 - c. An order of eviction and/or ejection of the Defendants by themselves, agents/servants/employees from the Plaintiff's Plot Number L.R. 1866/I Mainland North; and demolition of any or all the illegal structures on the suit property.
 - d. General damages for trespass to and/or illegal conversion of the Plaintiff's Plot Number L.R. 1866/I Mainland North from the date of the illegal entry.
 - e. Costs of and incidental to this suit;
 - f. Such other or further relief that this Honorable Court may deem fit and just to grant.
13. The Plaintiff called their witness PW - 1 on 15th July, 2024 where he averred that: -
- A. Examination in Chief of PW - 1 by Mr. Mukanzi Advocate.



14. PW - 1 was sworn testified in the English language. He identified himself as Father Erustus Nduati Chege. He was a citizen of Kenya with all the particulars as indicated in the national identity card shown to court during the hearing of the case. He was the Provisional Administrator. He took over from the previous witness Father Erick Ondieki Mairura and he was familiar with the witness statement dated 1st July, 2021 which he relied on as his evidence in chief and adopted the list of two (2) documents filed on 15th February, 2022 which were: -
 - a. Transfer form dated 22nd August, 2011
 - b. Provisional Certificate of Title dated 24th August, 2011 and a Map attached
15. The witness adopted and marked as Plaintiff Exhibit No. 1 and 2 (a) and (b) respectively. The land was given to us as a gift by Antony Praxedes D'Costa in the year 2011. On 22nd August, 2011 he transferred the freehold interest on the suit property to the Salesians of Don Bosco – it was not occupied. Prior to that he had complied to all the legal regimes and procedures. He obtained all the consents and approvals to effect the transfer. However, while trying to ascertain the actual size of the land, in the year 2017 they noticed that there was encroachment and people started building. They approached them, to stop but they were not co-operative. They engaged them in different way out of court. The witness visited the land. There were many people on the land. There were semi-permanent but they were now building permanent structures. The witness prayed to be given the land and the ownership to the land. There were more than ten (10) people and so were the structures. they had the provisional certificate of title. There would be need for the production of the certificate of title and a copy of the latest official search to the land.
16. The Plaintiff called PW - 2 on 11th November, 2024 at 11.30 am who testified as follows:-
 - A. Examination in Chief of PW - 2 by Mr. Mukanzi Advocate.
17. PW - 2 testified under oath and in English language. She was called (Sheila Nasambu Soita. She was the Land Registrar, Mombasa bearing Personal Numbers 20200206739. She was in court to give evidence to LR. No. 1866/I/MN CR. No. 16308/1 measures 0.1040 HA. The current absolute and legal owner of the said suit property were the Salesians of Don Bosco Registered Trustee Kenya 24th August, 2011. It was registered pursuant to a Transfer from Antony Praxedes D'Costa in form of a gift.
18. It was the evidence by PW - 2 that that Plaintiffs were the current owners of this property. She produced the original Certificate of title to court – (the said original Certificate of Title to the suit land was shown to court). It was originally registered to both Antony Praxedes D'Costa and Alice Mafadla Anna D'Costa. However, upon her demise on Entry No. 3 – her Certificate of Death dated 21st June, 2004 No. 7717877 was registered and the share of the deceased transmitted to Antony Praxedes. Entry No. 4 the property was transferred to the Plaintiffs. She produced the copy of the Certificate of Death dated 21st June, 2004. She also produced the Transfer documents of Antony Praxedes D'Costa to the Plaintiff dated 22nd August 2011.
19. PW - 2 reiterated that as per the Certificate of official search as on 26th November, 2020 the property showed it belonged to the Plaintiff which produced. According to her as per the records, they only had the Plaintiffs as the legal and registered owners to the property. The 1st to the 5th Defendants were strangers to them and their records.
20. On 11th November, 2024, the Plaintiff marked and closed its case through his Counsel Mr. Mukanzi Advocate



V. Submissions

21. On 11th November, 2024 after the Plaintiff marked the close of their case, the Honourable court directed that the Plaintiff file their submissions within stringent timeframe thereof on. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 5th February, 2025. However due to unavoidable circumstances it was eventually delivered on 25th July, 2025.

A. The Written submissions by the Plaintiff

22. The Plaintiff through the firm of Messrs. T.Mukanzi & Associates Advocates filed written submissions dated 6th December, 2024. Mr. Mukanzi Advocate commenced the submissions before this Honourable Court by stating that the suit instituted by the Plaintiffs against the Defendants herein. The Plaintiffs filed the suit herein vide a Plaint dated 1st July, 2021 seeking the afore - stated orders. The Learned Counsel submitted that the Defendants despite service and substituted service failed to enter appearance in the matter proceeded ex parte on diverse dates. It was the Plaintiff's evidence that they are and still are the proprietors of all that property known as Plot Number LR.1866/I Mainland North which is within Mombasa county .He further stated the plaintiffs had peaceful occupation and enjoyment of the suit property until sometimes in August when the Defendants without authority or consent, forcefully and wrongfully enter and illegally took possession of the suit property.

23. The Learned Counsel relied on the following issue for determination:-

- a. Whether the Plaintiff is the legal owner of the suit property
- b. Whether the Defendants have any rights over the suit property
- c. Whether the Plaintiff is entitled to orders of eviction and a permanent injunction as against the Defendants.
- d. Whether the Plaintiff is entitled to general damages
- e. Who should bear the costs of the suit?

24. On the issue of whether the Plaintiff was the legal owner of the suit property. The Learned Counsel relying on the provisions of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012 submitted that considering the evidence on record, the suit property Plot Number LR.1866/I Mainland North is currently registered in the Plaintiffs name). The Plaintiff produced in evidence a Provisional Certificate of Title dated 24th August 2011 and an Agreement for sale executed on 18th July 2011 marked as Plaintiff's Exhibits numbers 1 and 2 respectively. These evidences was corroborated by PW - 2 who was the Land Registrar, the County of Mombasa.

25. The Learned Counsel further stated in this instant case, the Plaintiff by producing the copy of the Provisional Certificate of title and the Agreement for sale together with the corroboration from the evidence of the Land Registrar has established that the Plaintiffs are the legal registered owner of the Suit property known Plot Number LR.1866/I Mainland North as the evidence was not controverted. The Plaintiffs therefore have an indefeasible and absolute Title as the registered owner of the suit property.

26. On whether the Defendants had any rights over the suit property. The Learned Counsel averred that it was the Plaintiff's testimony that the Defendants had illegally trespassed into and encroached the suit property. The Defendants without the Plaintiff authority or consent forcefully and wrongfully entered and illegally took into possession of the suit property and have remained in illegal possession thereof and they have further erected permanent and temporary structures. It was the Plaintiff's evidence that



all the attempts to have the matter resolved either by the chief or the jurisdictional police did not take any meaning course. Secondly, the defendants did not controvert the plaintiff's case. It goes without saying that the defendants could not have acquired any rights over the suit property.

27. On whether the Plaintiff is entitled to orders of eviction and a permanent injunction as against the Defendant. The Learned Counsel argued that the provision of Section 3 (1) of the Trespass Act, Cap 294 provides that:-

“Any person who without 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, private land without the consent of the occupier there of shall be guilty of an offence.”

28. The Learned Counsel relied on the case of the “Entick – Versus - Carrington (1765)” as quoted in the case of “Maina Kabuchwa – Versus - Gachuma Gacheru [2018] eKLR”, Lord Camden CJ had this to say: -

“Our law holds the property of every man so sacred, the no man can set his foot upon his neighbour's close without his leave.”

29. They also relied on the case of “Maina Kabuchwa – Versus - Gachuma Gacheru (Supra)”, the Learned Judge defined trespass as: -

“the act of unauthorized and unjustifiable entry upon the land in another's possession. The wrong of trespass is actionable regardless of the extent of the incursion and without any necessary showing of injury or damage to the Claimant.”

30. According to the Learned Counsel it had been proved beyond reasonable doubt that the Plaintiff is the legal owner of suit property and that the Plaintiff never authorized the Defendants to enter into, occupy or possess the land, it is obvious that the Defendants have trespassed onto the suit property and they should be evicted. Further, the Plaintiff was entitled to quiet possession and enjoyment of the suit property. Accordingly, the order of a permanent injunction against the Defendants jointly and severally as prayed was therefore fit and should be granted in this instance.

31. On whether the Plaintiff is entitled to general damages, the Learned Counsel stated that it was the Plaintiff testimony that the suit property was vacant before the Defendants trespassed into it. The issue that arises is: what is the measure of it? This question was answered by Justice E. Obaga J in the case of “Philip Ayaya Aluchio – Versus – Crispinus Ngayo [2014] eKLR” where it was held as follows: -

“The Plaintiff is entitled to general damage for trespass. The issue which arises is as to what is the measure of such damages? It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less.

32. The Learned Counsel submitted that they propose a global figure of a sum of Kenya Shillings Three Million (Kshs. 3,000,000/-) as an appropriate award under the hearing, general damages for trespass. They relied in the case of “Park Towers Ltd – Versus – John Mithamo Njikia & 7 Others (2014) eKLR” as cited in the case of “Avid Developers Limited – Versus – Blue Horizon Properties Ltd & 2 Others (2021) eKLR” where the Court held that where trespass is proved, a party need not prove that he suffered any specific damage or loss in order to be awarded damages. Damages shall be awarded depending on the unique facts and circumstances of each case.



33. On who should bear the costs of the suit, the Learned Counsel submitted that the Plaintiff having participated in this suit undefeated despite service even after substituted service in this case should be awarded the costs of this suit.
34. In conclusion the Learned Counsel contended that based on the evidence presented, it is clear that the Plaintiff is the legal and registered owner of the suit property, Plot Number LR.1866/ I Mainland North. The Plaintiff provided uncontroverted documentary evidence, including a Provisional Certificate of Title and an Agreement for Sale, which were corroborated by the testimony of the Land Registrar. According to the provision of Sections 24 and 26 of the [Land Registration Act](#) No. 3 of 2012, the Plaintiff's registration as the owner of the property confers upon them absolute and indefeasible ownership, which cannot be challenged except on grounds of fraud or illegality, neither of which have been demonstrated in this case.
35. The Defendants, on the other hand, have been found to had illegally trespassed onto the suit property without the Plaintiff's consent. The Plaintiff's testimony, supported by the failure of the Defendants to present any rebuttal, proves that the Defendants unlawfully entered and occupied the property, erecting permanent and temporary structures thereon. Under the provisions of the provisions of the [Trespass Act](#), Cap 294, this constitutes a violation of the Plaintiff's rights as the lawful owner of the land.
36. It was their humble submission that the Honourable Court grants the Plaintiffs prayers as contained in the Plaint dated 1st July 2021.

VI. Analysis and Determination

37. I have keenly assessed the filed pleadings by all the Plaintiff herein, the written submissions, the myriad of cited authorities, the relevant provisions of [the Constitution](#) of Kenya, 2010 and the statutes.
38. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -
 - a. Whether the suit instituted by the Plaintiffs has any merit or not.
 - b. Whether the Defendants trespassed unto the suit properties without authority of the Plaintiff
 - c. Whether the Plaintiff is entitled to the orders sought in the Plaint
 - d. Who bears the costs of the suit?

Issue No. A). Whether the suit instituted by the Plaintiffs has any merit or not.

39. Under this sub title, the Honourable Court examines that the main substratum in this matter is on who is the registered proprietor of the suit property. From the very onset, I take cognizance to the fact that land in Kenya is extremely sensitive and emotive. Land is used as a source of livelihood. Indeed, the Certificate of Titles have been utilized as collateral for securing financial support on undertaking variety of development ventures from financial institutions. According to the provision of Articles 61, 62, 63 and 64 [Constitution of Kenya, 2010](#) land is classified into three (3) being Public, Private and Community land. The ownership of land, effect and efficacy of the registration of the land in Kenya are governed under the provision of Article 40 of [the Constitution](#) of Kenya, 2010; Sections 24, 25 and 26 of the [Land Registration Act](#) No. 3 of 2012.
40. Article 40 provides:
 - (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—



- (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person--
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law....”

41. Section 24 provides that:-

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease

42. While the provision of Section 26 on the other hand provides that: -

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

43. Based on the evidence presented, it is clear that the Plaintiff is the legal and absolute registered owner of the suit property, Plot Number LR.1866/I Mainland North. The Plaintiff provided uncontroverted documentary evidence, including a Provisional Certificate of Title and an Agreement for Sale, which were corroborated by the testimony of the Land Registrar. According to Section 24 and Section 26 of the [Land Registration Act](#) No. 3 of 2012, the Plaintiff's registration as the owner of the property



confers upon them absolute and indefeasible rights, interest and title, which cannot be challenged except on grounds of fraud or illegality, neither of which have been demonstrated in this case. Since the Defendant never filed any Defence to controvert the Plaintiff's averments nor challenge the Certificates of Title presented, I have no reason to doubt them.

44. On validity of title is stated out under the provision of Section 26 (1) of the [Land Registration Act](#), No. 3 of 2012. In the case of "Willy Kipsongok Morogo – Versus - Albert K. Morogo (2017) eKLR" the Court held as follows:-

“The evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the [Land Registration Act](#).”

45. From the facts before me while relying on the legal provisions cited above, as well as associating myself with the decision quoted, I find that since the Plaintiff had produced Certificates of Title to prove ownership of the suit lands, which titles have not been challenged by the Defendants, it is indeed the absolute proprietor of the said suit lands, hence entitled to all indefeasible rights, title, interest and privileges belonging or appurtenant thereto to the Plaintiffs and to protection of the law as envisaged under Sections 24, 25 and 26 of the [Land Registration Act](#), No. 3 of 2012.

Issue No. B). Whether the Defendants trespassed onto the suit properties without authority of the Plaintiff

46. Under this sub title, we shall examine the issue of trespass. It is confirmed that indeed the suit properties belong to the Plaintiff though from the beginning the same issue was never contested. It is incumbent upon the court to protect the Plaintiff rights to ownership of property the same having been sought by the Plaintiff herein.
47. It is trite that the doctrine of “the Burden of Proof” holds that he who alleges must prove and the proof in civil matters should be on a balance of probability. The provision of Sections 107, 108 and 109 of the [Evidence Act](#), Cap. 80 provides as follows: -

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (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.

108. 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.

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

48. Similarly, in the provision of Sections 109 and 112 of the Act provides as follows:

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



112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
49. Trespass has been defined by the 10th Edition of Black's Law Dictionary as:-
“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”
50. The Court in the case of:- “John Kiragu Kimani – Versus - Rural Electrification Authority [2018] eKLR” also in defining trespass relied on Clark & Lindsell on Torts, 18th Edition on page 923 which defines trespass as: -
‘any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason’.
51. The provision of Section 3 (1) of the Trespass Act, defines trespass as follows:-
“Any person who without 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, private land without the consent of the occupier thereof shall be guilty of an offence.”
52. It is hinged on Article 40 of the Constitution of Kenya, 2010. In the case of “Eliud Njoroge Gachiri – Versus - Stephen Kamau Ng'ang'a (2018) eKLR”, it was held that:-
“A continuing trespass is defined in Jowitt's Dictionary Of English Law 2nd Edition as follows:-
‘A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbour's land.’
In Black's Law Dictionary 8th Edition, a continuing trespass is defined as:-
‘A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property.’
Finally, in Clerk & Lindsell On Torts 16th Edition, paragraph 23 - 01, it is stated that:-
‘Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.’”
53. Further trespass has been defined by Clerk and Lindsell on Torts, 18th edition at Pg.23 as;
“any unjustifiable intrusion by one person upon the land in possession.”
54. There is no doubt that trespass is an intrusion by a person into the land of another, who is in possession and ownership. It is evident that the Plaintiff is the registered proprietor of the suit property. Thus, the Honourable Court is fully satisfied that the Plaintiff is the registered owner of the suit property. The Plaintiff having accused the Defendants of entering upon its suit property which the Plaintiff is in possession of, without the Plaintiff's permission and the Defendants having failed to enter appearance to explain themselves, it is the Court's considered view that the same amounts to intrusion on the Plaintiff's land and thus trespass.



55. Taking into account the above analysis of the evidence on record, the Court finds and holds that the Defendants indeed trespassed on the Plaintiff's suit land.

Issue No. c). Whether the Plaintiff is entitled to the orders sought in the Plaintiff

56. Under this Sub - heading, the Plaintiffs have sought for various Reliefs as contained at the foot of the Plaintiff, herein. Having concluded that the Plaintiff has proved his case; prayer (a) and prayer (c) of the Plaintiff are hereby granted.

57. On the permanent injunction, it is not in doubt that the Plaintiff is the registered owner over the suit property and is consequently the indefeasible and absolute owner. The Principles on Injunction were established in the celebrated case of "Giella – Versus - Cassman Brown & Co. Ltd (1973) EA 358". Having looked at the Plaintiff's exhibits produced in court, I hold that the Plaintiff has indeed established a prima facie case and proved its case to the required threshold to warrant the grant of permanent injunctive orders sought.

58. Therefore, it is entitled to all the rights and privileges appertaining to it as provided by Sections 24 and 25 of the Land Registration Act. In this regard, the Plaintiff therefore is entitled to the quiet use of his land and the Court finds and holds that the Plaintiff's entitled to the orders sought. Consequently, I will proceed to find that the Defendants either by themselves, agents, servants and /or anyone claiming under the defendants should be permanently restrained from remaining on or continuing in occupation of Plot Number L.R. 1866/I Mainland North.

59. On the issue of general damages for trespass, the issue that arises is: what is the measure of it? This question was answered by E. Obaga J in the case of "Philip Ayaya Aluchio – Versus - Crispinus Ngayo [2014] eKLR", where it was held as follows:-

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).”

60. 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 1st and 2nd Defendants trespass”

61. In Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, it is provided as follows:-

- (a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
- (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- (c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.



(d) --

(e) --

62. From the evidence on record, there is nothing that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the Plaintiff suffered for him to be compensated for the loss. However, in relying on the above authorities, I find the Plaintiff has suffered damages as a result of the defendants' unlawful acts of trespass and award him a sum of Kenya Shillings Three Million five Hundred Thousand (Kshs. 3,500,000/-) as regards to prayer (d) as compensation for general damages for trespass and the illegal conversion.

Issue No. d). Who bears the costs of the suit

63. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

64. In "Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR" quoted the case of "Levben Products – Versus -Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227" the Court held;

"It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

65. In the present case, I reiterate that the Plaintiff has proved its claim against the Defendants. Therefore, the Plaintiff shall have the costs.

VII. Conclusion and Disposition

66. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiff has established his case against the Defendant. Thus, the Court proceeds to make the following specific orders:

- a. That Judgment be and is hereby entered in favour of the Plaintiff as per the Plaint dated 1st July, 2021 and filed on 5th July, 2021 in its entirety with costs.
- b. That a declaration be and is hereby issued that the Defendants' actions of unauthorised entry into the Plaintiffs Plot Number L.R. 1866/I Mainland North, continued occupation, and



constructing permanent structures thereon amounts to trespass, therefore illegal, null and void.

- c. That an Order of permanent injunction do and is hereby issued restraining the Defendants, whether by themselves or his servants/agents/employees from remaining on or continuing in occupation of Plot Number L.R. 1866/I Mainland North.
- d. That an order of eviction and/ or ejection of the Defendants do and is hereby issued by themselves, agents/servants/employees from the Plaintiff's Plot Number L.R. 1866/I Mainland North; and demolition of any or all the illegal structures on the suit property pursuant to the provision of Section 152 E of the Land Act, No. 6 of 2012.
- e. That the Plaintiff be and is hereby awarded Kenya Shillings Three Million, Five Hundred (Kshs. 3,500,000/-) as general damages for trespass to and/or illegal conversion of the Plaintiff's Plot Number L.R. 1866/I Mainland North from the date of the illegal entry.
- f. That the court awards the costs of litigation of the Plaintiff to the Plaintiff.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 25TH DAY OF JULY 2025.

.....

HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT
AT MOMBASA

Judgement delivered in the presence of: -

M/s. Firdaus Mbula – the Court Assistant.

M/s. Ambusi Advocate holding brief for Mr. Mkanzi Advocate for the Plaintiff.

No appearance for the Defendant.

