

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT**  
**KITALE**  
**ELC CASE NO. 87 OF 2016**

**JULIA WAKESU**  
**MOGAYI-----PLAINTIFF**

**VERSUS**

**JANEFER CHEPKEMOI-----1<sup>ST</sup>**  
**DEFENDANT**  
**SARAH WANJIRU-----2<sup>ND</sup>**  
**DEFENDANT**  
**MIRRIAM NYAMBURA-----3<sup>RD</sup>**  
**DEFENDANT**  
**MONICAH CHEPKOSGEI-----4<sup>TH</sup>**  
**DEFENDANT**  
**CHARLES CHEBII-----5<sup>TH</sup>**  
**DEFENDANT**  
**DANIEL KIPSIGOR-----6<sup>TH</sup>**  
**DEFENDANT**  
**MUSA MASAFU-----7<sup>TH</sup>**  
**DEFENDANT**  
**EUNICE CHEPKAT-----8<sup>TH</sup>**  
**DEFENDANT**  
**KIBET SIGOR-----**  
**9<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff approached the court through a plaint dated **23/5/2016**. She seeks;
  - (a) **Declaration that the defendants have no proprietary rights or right to continue remaining on or cultivating her land title No. Cherangany/Kapcherop/605,**

**hereinafter, the suit land, and should be evicted.**

**(b) Permanent injunction.**

**(c) Damages for trespass.**

**(d) Costs and interest.**

- 2.** The plaintiff contends that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants, who are the daughters of the 4<sup>th</sup> defendants and children of her late brother-in-law, allegedly in **2015** leased out **10 acres** out of the suit land to the 4<sup>th</sup> - 9<sup>th</sup> defendants after she moved out to a safer place following post-election violence in **2007**, without her consent or authority.
- 3.** The plaintiff avers that despite assertion of her rights to use, control, or manage the suit land, the 4<sup>th</sup> - 9<sup>th</sup> defendants have become rude, resisted her said efforts, and instead continued their acts of trespass claiming authority from the 1<sup>st</sup> - 3<sup>rd</sup> defendant, yet she is the registered proprietor of the land measuring **25 acres**.
- 4.** Further, the plaintiff avers that the 1<sup>st</sup> - 3<sup>rd</sup> defendants have also built a house on the land, claiming to own it, and further have destroyed her trees on the land.
- 5.** The defendants opposed the suit through an amended joint statement of defence and counterclaim dated **17/7/2019**. The 1<sup>st</sup> - 4<sup>th</sup>

defendant aver that they are entitled to **12 ½ acres** out of the suit land, which share belonged to their late father, hence their occupation and possession is lawful.

- 6.** The 1<sup>st</sup> - 4<sup>th</sup> defendants aver that they have a right to utilise the said share to the exclusion of the plaintiff. The 1<sup>st</sup> - 3<sup>rd</sup> defendants aver that the suit land was bought by the late brothers and their late mother in **1979** or thereabout, which share of land the plaintiff is out to grant, while alleging that the 4<sup>th</sup> defendant only gave birth to girls. The 1<sup>st</sup> - 4<sup>th</sup> defendants aver that the construction of the house on the suit land is lawful, being the children and wife of the late Musa Kanyita.
- 7.** The defendants challenge the *locus standi* of the plaintiff to institute the suit against them or to bring the suit for herself, terming it as bad in law, an afterthought, misplaced, incompetent, time-barred, misconceived, and fatally defective. The defendants deny that the plaintiff is the registered owner of the land on behalf of her late husband, and if that be the case, which is denied, then she is only a trustee for the late husband, who was holding the title in trust for their family.
- 8.** The defendants aver that the plaintiff obtained the title deed in her name through fraudulent means,

with a lot of secrecy and also in breach of the trust bestowed upon her by her parents' father, uncle, and the defendants herein. The defendants gave the particulars of breach of trust as:

- (a)** *Taking family land and purporting it belongs to her late husband.*
- (b)** *Abusing the trust as the wife of their uncle without disclosing the trust behind the registration.*
- (c)** *Failing to account for the beneficiaries who are the occupants of the land.*
- (d)** *Failing to surrender the trust property to the beneficiaries.*
- (e)** *Pretending to be the sole owner of the suit land, yet it is family land, out of their illiteracy.*
- (f)** *Failing to transfer the share to them after reaching the age of majority.*

**9.** By way of a counterclaim, the defendants aver that although the suit land measuring **25 acres** is in the name of the plaintiff, it is family land which should be shared and or subdivided into two portions in the name of the plaintiff and her children, and the 2<sup>nd</sup> defendant and her siblings.

**10.** The defendants deny that they are trespassers on the land; otherwise, they had been as of right for over **30 years** before their late father and husband died, who had settled them there and erected a house for them. The defendants averred that the

suit land was bought jointly by the mother-in-law of the plaintiff and the 1<sup>st</sup> defendant, who was also the grandmother of the 2<sup>nd</sup> - 4<sup>th</sup> defendants.

**11.** The defendants aver that the use of the land among the two brothers in their respective shares, as shown by the late mother of the two and the resultant use and construction of a house therein, has never been interrupted, and it was peaceful and clear up to the demise of the two brothers.

**12.** The defendants seek:

**(a) Declaration that the plaintiff holds the title to the suit land in trust for herself and for the 1<sup>st</sup> - 4<sup>th</sup> defendants in equal shares, which should now terminate.**

**(b) Declaration that the 1<sup>st</sup> - 4<sup>th</sup> defendants are the rightful owners of 12 ½ acres of the suit land, and an order do issue directing the Land Surveyor to subdivide the land and carve out their rightful share.**

**(c) An order directing the Land Registrar to cause the title to the suit land, in the name of the plaintiff, and for the amendment of the Registry Index Map, for the 1<sup>st</sup> - 4<sup>th</sup> defendants, to be given half of the title to them.**

**(d) Permanent injunction.**

**13.** By way of a reply to the amended defence and defence to the counterclaim, the plaintiff denies concealing material facts from the court and insists

that she solely owns the suit land. The plaintiff denied that the 1<sup>st</sup> - 4<sup>th</sup> defendants are entitled to **12 ½ acres** out of the suit land, or any portion thereof, since the land never belonged to their late father or husband, hence their occupation therein is unlawful and amounts to trespass.

**14.** The plaintiff avers that the 1<sup>st</sup> - 4<sup>th</sup> defendants have no legal or equitable right to occupy the portion to her exclusion. The plaintiff avers that she lawfully and procedurally became the registered owner of the title for the suit land, terming the allegations of fraud or breach of trust as baseless, unsubstantiated, and without merit.

**15.** The plaintiff denies the contents of the counterclaim, terming the defence and trespass to her land without any colour of right or consent. The plaintiff denies that the 1<sup>st</sup> - 4<sup>th</sup> defendants had resided or occupied the suit land before the death of her husband or the brother-in-law, and thereafter, or were entitled to the reliefs sought in the counterclaim.

**16.** At the hearing, following evidence of service of the hearing date upon the defendants, **Julia Wakesu Mogayi** testified as **PW1**. She relied on a witness statement dated **23/5/2016** as her evidence-in-chief.

- 17.** PW1 stated that she is the registered owner of land title No. **Cherangany/Kapcherop/605**, measuring **25 acres**. PW1 said that the 1<sup>st</sup> - 3<sup>rd</sup> defendants are daughters of the 5<sup>th</sup> defendant and her late brother-in-law, who died landless, with no interest in her land.
- 18.** PW1 said that the 4<sup>th</sup> - 9<sup>th</sup> defendants claim to be tenants of the 1<sup>st</sup> - 3<sup>rd</sup> defendants. PW1 said that after the post-election violence in **2007**, she moved out of the suit land to safer ground but continued leasing out the land to third parties until **2015**, when the 1<sup>st</sup> - 3<sup>rd</sup> defendants, without any colour of right or authority from her, invaded the land and leased out **10 acres** out of it to the 4<sup>th</sup> - 9<sup>th</sup> defendants without her authority. PW1 said that efforts to access or use the land in order for the defendants to cease their acts of trespass have not been successful.
- 19.** Further, PW1 stated that the 1<sup>st</sup> - 3<sup>rd</sup> defendant had also, without her consent, erected a house on the land and destroyed her trees, claiming to own the land. PW1 said that she has no lease contract on the suit land with the defendants; they hold no proprietary right or interest in the land. PW1 said that the defendants have denied her quiet user and possession of the land, hence the reliefs sought.

- 20.** PW1 relies on a copy of the title deed issued on **14/4/2016** and photographs as **P. Exhibits No. (1)** and **(2)**. PW1 termed the defendants as trespassers to the suit land.
- 21.** Concerning the statement of defence and counterclaim, PW1 said that her late brother-in-law was never a joint owner of the suit land or entitled to a share thereof, as alleged by the defendants. PW1 said that the 5<sup>th</sup> - 9<sup>th</sup> defendants were strangers to her.
- 22.** In the absence of attendance, despite evidence of service with a hearing notice, the defendants' joint amended statement of defence and counterclaim dated **17/7/2019** was marked as closed.
- 23.** Mr. Teti, the learned counsel for the plaintiff, submitted that the plaintiff, as the sole registered owner of the suit land, which has not been challenged under **Section 26** of the Land Registration Act on any vitiating factors, is entitled to the relief sought in the plaint.
- 24.** Learned counsel submitted that the particulars of breach of trust or fraud have not been substantiated for lack of evidence, and therefore, the contents of the amended defence and counterclaim remain mere statements.

25. Trespass to land is a violation of the right to use land through wrongful or unjustified acts. In **Board of Trustees, National Social Security -vs- Keiyo Teachers Co-operative Savings and Credit Society & 6 others [2026] KECA 327 (KLR)**, the court said that the core element of fraud is the intention to deceive to gain an unlawful advantage.
26. In **Warrakah (Suing as the Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah - Deceased) v Mwatsami (Civil Appeal E015 of 2020) [2024] KECA 579 (KLR) (24 May 2024) (Judgment)**, the court said that trespass occurs when a person enters upon land in possession of another without permission and remains there, places or projects an object or activities on the land of another. The court said that the tort of trespass accrues when enforcing the right of possession against unlawful interference.
27. In **Muthiora -vs- Marion Muthama [2022] KECA 28 [KLR]**, the court termed trespass as unauthorised entry, whether present or continuous, and that to prove trespass, one has to show that he had immediate exclusive possession, whose rights have been violated by the intruder, as held in

**M’Kiara M’Mukanya & Another -vs- M’Mbijiwe [1984] eKLR.**

- 28.** In this suit, the onus is on the plaintiff to prove that she is the owner of the suit land and that the defendants have invaded or occupied it without any justifiable reason. See **Ochako Obinchu -vs- Zachary Oyoti Nyamongo [2018] eKLR.** The plaintiff has entered evidence that she is the registered owner and that the defendants have violated her rights to use, possess, or occupy the land.
- 29.** The 1<sup>st</sup> - 4<sup>th</sup> defendants, while admitting the entry and occupation, invoke overriding interests which the plaintiff has allegedly breached, for not disclosing that the land is held in trust for the late brother-in-law to the plaintiff and their late father and husband, respectively.
- 30.** Other than filing the amended defence and counterclaim, the defendants did not file witness statements and documents or attend court to substantiate the contents of the same.
- 31.** The defendants aver that the plaintiff obtained title to the land in secrecy, fraudulently, and in breach of the trust. Fraud, illegality, breach of trust, and irregularity must be specifically pleaded and

distinctly proved, as held in **Vijay Morjaria -vs- Nansingh Madhusingh Darbar [2000] eKLR.**

**32.** Although a certificate of title is conclusive evidence that the person named therein is the absolute owner, there is no guarantee of the same if the title is proved to have been acquired corruptly, fraudulently, illegally, or unprocedurally. See **Embakasi Properties Ltd & Another -vs- Commissioner of Lands & Another [2019] eKLR.**

**33.** What the 1<sup>st</sup> - 4<sup>th</sup> defendants are alleging is that the suit land was acquired jointly and that the title deed held by the plaintiff is subject to their overriding interests under **Section 28** of the Land Registration Act. The ingredients to establish a customary or family trust were set out in **Isack M'Inanga Kiebia -vs- Isaaya Theuri M'Lintari Petition No. 10 of 2015.** A claim must prove that:

- (a)** *The land in question was, before registration, family, clan, or group land.*
- (b)** *The claimant belongs to that family, clan, or group.*
- (c)** *The relationship of the claimant to the group, family, or group is not tenuous.*
- (d)** *The claimant would have been registered as the owner, but for some intervening circumstances.*

(e) *The claim is directed against the registered owner who is a member of the family, group, or clan.*

34. The court said that trust is proved through evidence, depending on its quality and the merits of each case, as held in **Kanyi Muthiora -vs- Maritha Nyokabi Muthiora [1984] KECA 23 (KLR)**. The burden was on the 1<sup>st</sup> - 4<sup>th</sup> defendants to advance the concept of customary trust by demonstrating the five ingredients set out above, as regards the suit land.
35. Customary trust must be pleaded and proved. In **Ciero & another -vs- Njanja & 2 others (Civil Appeal 111 of 2022) [2025] KECA 1541 (KLR) (3 October 2025) (Judgment)**, the court cited **Jutelabi African Adventure Ltd & Another -vs- Christopher Michael Lockley [2017] eKLR**, that the onus lies on a party relying on the existence of a trust to prove it through evidence, since the law never implies, and a court does not presume a trust unless in cases of absolute necessity, to give effect to the intention of the parties, which intents must be clearly determined before a trust is implied, as held in **Gichuki -vs- Gichuki [1982] KLR 285**.
36. In this suit, the 1<sup>st</sup> - 4<sup>th</sup> defendants have attached no letters of administration showing capacity to

advance the interest of their late father and husband, respectively.

- 37.** Evidence that the suit land, before registration in **2016**, had been acquired jointly by the two brothers and the mother is missing. The 5<sup>th</sup> - 9<sup>th</sup> defendants have equally not proved that they are *bona fide* lessees of the suit land, without notice of the absolute rights of the plaintiff.
- 38.** Trespass is actionable *per se* without proof of damages. A party that fails to attend court to advance its defence leaves it as a mere statement without substantiation.
- 39.** A permanent injunction is a long-term remedy that is issued after the merits of a case to stop further breach of a determined right of a claimant. The plaintiff has tendered evidence that there was no intention to create a trust in favour of the 1<sup>st</sup> - 4<sup>th</sup> defendants. The nexus between her late brother-in-law and the suit land in terms of its source or origin has not been established by the 1<sup>st</sup> - 4<sup>th</sup> defendants.
- 40.** The 5<sup>th</sup> - 9<sup>th</sup> defendants have not justified their occupation of the land to defeat the right of the absolute registered owner. The 1<sup>st</sup> - 4<sup>th</sup> defendants have not justified why they erected a house on the land without permission.

**41.** The court finds the prayers sought by the plaintiff merited and proceeds to issue the following orders.

- i. A declaration is hereby issued that the defendants have no proprietary rights or right to continue remaining on or cultivating her land Title No. Cherangany/Kapcherop/605.**
- ii. The defendants are hereby ordered to vacate Title No. Cherangany/Kapcherop/605, in default of which they shall be evicted according to the law, at their own costs and expenses.**
- iii. An order for permanent injunction is hereby granted, restraining the defendants, their agents, servants or any other person from encroaching on or in any manner interfering with the plaintiff's interest over Title No. Cherangany/Kapcherop/605.**
- iv. Damages for trespass of Kshs. 500,000/=.**
- v. The amended defence and counterclaim are dismissed for lack of merit.**
- vi. Costs and interests on (iv) above from the date of the judgment to the plaintiff.**

**42.** Orders accordingly.

**Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 15<sup>th</sup> day of April 2026.**

**In the presence of:**

Court Assistant - Dennis

Mr. Teti for the plaintiff present

Defendants absent

A handwritten signature in blue ink, appearing to be 'C.K. Nzili', written over a horizontal line.

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