



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC CIVIL SUIT NO. 201 OF 2014**

**[Originally High Court Nairobi ELC Civil Suit No. 636 of  
2014]**

**BETWEEN**

**TIMOTHY            MUSAU            MUTUA            .....**  
**.....PLAINTIFF**

**VERSUS**

**MBATHA ISINGI & DAUDI ISINGI [sued as the legal  
representatives of the estate of Kamala Isingi (deceased) ]  
.....DEFENDANT**

**AND BY COUNTERCLAIM**

**MBATHA ISINGI alias Bernard Nduta Isingi &  
DAUDI ISINGI alias David Kasyoki Isingi(suing as the legal  
representatives of the estate of Kamala Isingi (deceased)  
.....PLAINTIFF**

**VERSUS**

**TIMOTHY**

**MUSAU**

**MUTUA.....**

**.....DEFENDANT**

## **JUDGMENT**

1. In a plaint dated 14 May 2014, the plaintiff sued Kamala Isingi (deceased defendant). Following his demise on 23 March 2022, and with leave of the court, he was substituted by his legal administrators, culminating in the filing of the amended plaint dated 6 September 2022.
2. In this amended plaint, the plaintiff asserted that he purchased **plot no. 95 in Makutano Market (the suit property)** from Isingi Kikumbi (**Kikumbi**), the deceased plaintiff's father, in 1980, had been in possession since then, and had been paying the requisite land rent while awaiting the issuance of the title documents. Upon Kikumbi's demise in 2011, the deceased plaintiff trespassed onto the suit property without permission and commenced construction. Despite his demise, his administrators continue these illegal activities. Thus, he sought the following orders from this court:

***a) A declaration that he was the legal and rightful owner of the suit property.***

***b) An order for delivery of vacant possession of the suit property.***

- c) A permanent injunction restraining the deceased defendant, or anyone claiming ownership of the suit property from the deceased, from entering, disposing of, alienating, or in any way interfering with the plaintiff's quiet possession of the suit property.***
- d) General damages and interest thereon.***
- e) Mesne profits for the unfair and illegal benefit the deceased defendant's estate had derived from occupying the suit property.***
- f) Costs of the suit.***
- g) Interest on orders (d), (e) and (f) at court rates.***
- h) Any other or further relief as the court may deem fit and just to grant.***

3. On service, the deceased defendant filed a defence dated 24 June 2014, which was amended by a defence and counterclaim dated 24 November 2022. The amended defence was largely composed of denials and put the plaintiff to strict proof. The deceased defendant also contended that the plaintiff's suit was statute-barred and that the suit property formed part of **Mwala/Mango/1232 (1232)**, belonging to Kikumbi (referred to as Isingi Kikumbi Kamala in the defence). The deceased defendant maintained that 1232 was a subdivision of **Mwala/Mango/28 (28)** and that Kikumbi never sold any land to the plaintiff. The deceased defendant particularised fraud

against the plaintiff and maintained that he had always been in occupation for two decades.

4. In the counterclaim, it was contended that the plaintiff had hived off the suit property from 1232, but it was also maintained that 1232 borders a parcel of land near Makutano Market. The deceased defendant sought the following reliefs: -

***a) A declaration that the plaintiff's act of secretly hiving off a portion of 1232, converting it into the suit property, and registering it in his name was wrongful and unlawful.***

***b) An order that the registration of the suit property be cancelled and that the suit property be reverted to 1232.***

***c) General damages for trespass and mesne profits.***

***d) Costs of the suit and of the counterclaim.***

5. Ultimately, this case proceeded to a hearing on 18 July 2023, during which the plaintiff **(PW1)** testified, and his evidence was led by Daniel Nzioki Mutua **(PW2)** and William Kivuva **(PW3)**. As for the defendant, David Kasyoki Isingi **(DW1)** testified. They relied on their oral testimonies, witness statements, and documents produced, with the plaintiff's

marked as **Pex. 1-25** and of the deceased defendant's as **Dex. 1-8**.

6. It was the plaintiff's testimony that he bought the suit property from Kikumbi under the agreement for sale dated 20 April 1980 (**Pex 1 & 2**) whereby Mutua Nzuni signed for Kikumbi, and PW2 signed for the plaintiff. The purchase price was Ksh 6,000/-, of which a total of Kshs. 5000/- was paid (**Pex. 1-10**). He made payments to the Masaku County Council for the suit property, including plot confirmation, rent, and construction costs, among others. Notably, some of the receipts are not legible. However, he produced a letter from Masaku Sub-County dated 26 August 2013 and a letter from Machakos County dated 22 September 2020, showing that the suit property was in his name (**Pex 23 and 24**).
7. During cross-examination, he stated that he had not purchased a house from Kikumbi but rather a shop. He contradicted his earlier evidence that he had been in occupation and asserted that he had never occupied the suit property. He informed the court that he had sought to place building materials on the suit property, at which point the deceased defendant stopped him. He also stated that neither he nor Kikumbi had signed the agreement for sale. The agreement for sale did not disclose the plot no, and he did not have documents to substantiate that the suit property had been transferred to him.

8. In re-examination, he again changed his line of evidence and stated that he took possession of the vacant “door” upon purchase and maintained possession up to the point of Kikumbi’s demise. Further, he paid the consideration, less Kshs. 1,000/-, which was for transfer fees. He distanced himself from any knowledge that the suit property was part of 1232.
  
9. **PW2** testified that he prepared the agreement for sale and executed it as the plaintiff’s representative, and that Joseph Mutua Nzuni represented Kikumbi and that Joseph Mutua Nzuni was not Kikumbi’s relative. He informed the court that Kikumbi died in 2010 and that the outstanding balance of the purchase price, which was Kshs. 1,000/- had never been settled by the plaintiff.
  
10. **PW3** stated that in 1999, he convened a clan meeting at which Kikumbi confirmed the contents of the agreement for sale. However, his letter of 8 October 2014 (**Pex. 21 & 22**) shows that he met with Kikumbi’s widow and children, but the meeting was inconclusive. He stated that upon Kikumbi’s demise, the deceased defendant constructed a structure on the suit property. On cross-examination, he testified that Kikumbi never executed the agreement for sale and that Kikumbi’s children were born on the suit property and had always been in occupation of it.

11. **DW1** informed the court that 1232 borders Makutano market, which is owned by the County Government of Machakos and comprises numerous market plots. He denied the sale of 1232 and/or 28 to the plaintiff and stated that any agreements held by the plaintiff were forgeries and that the suit property was illegal. He stated that the deceased defendant had been in occupation for two decades. He produced a copy of the title document for 1232 (**Dex. 1**).
12. On cross-examination, he testified that he was not privy to the plaintiff's sale agreement, Kikumbi never participated therein, and that, according to the plaintiff's produced documents, he had no records showing that 1232 was ever subdivided to create the suit property. In re-examination, he stated that the suit property was part of 1232, which Kikumbi had constructed upon.
13. Following the conclusion of the hearing, the law firms representing them filed written submissions with **Ms. B. M. Musau & Co. Advocates LLP** for the plaintiff, filing theirs dated 15 January 2025 and **Ms. Nzei & Company Advocates** dated 27 January 2026. Both counsel delineated several issues for determination; however, upon review of the entire case and rival submissions, this court identifies the issues for determination as: -

- a. Whether this court has jurisdiction to entertain the suit.***
- b. Whether the plaintiff proved his trespass claim.***
- c. Whether the deceased defendant specifically pleaded fraud and, if so, whether he proved it.***
- d. Whether the defendant specifically pleaded illegality and proved it.***

14. Accordingly, in its analysis and determination, the court will meticulously consider the arguments presented in these submissions alongside the relevant legal principles and judicial precedents cited. We will now address these issues.

***a. Whether this court has jurisdiction to entertain the suit.***

15. In his submissions, the deceased defendant argues that, first, the plaintiff should have sued Kikumbi's estate, and second, the suit is time-barred. He also raises the issue that the sale agreement contravenes the provisions of the **Law of Contract Act**; nevertheless, this latter limb will be addressed in the second issue.

16. In positing these grounds, it is evident that the deceased defendant misapprehended the essence of claims of trespass. Trespass has been defined by our laws and eminent scholars in the following manner:

**Section 152A** of the **Land Act 2016** states as follows: -

***“A person shall not unlawfully occupy Private, Community or Public Land.”***

**Section 3 (1)** of the **Trespass Act** defines trespass as: -

***“any person who without unreasonable 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.”***

17. As for the writings of eminent scholars, the text of **Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923**, defines trespass to land as follows: -

***“Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.”***

18. **Page 927** of the same text discourses as to who may sue for trespass, and it states as follows: -

***“Trespass is actionable at the suit of the person in possession of land, who can claim damages or***

***injunction, or both... Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner."***

19. In the book of **Winfield & Jolowicz on Tort, Sweet & Maxwell, 19<sup>th</sup> Edition, page 428**, trespass is discussed as follows:

***"Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land."***

20. The prevailing theme in the definition of trespass, as articulated by these esteemed scholars, is that ownership is not a prerequisite for such a claim. Nevertheless, the assertion

of a person holding title to the land takes precedence in cases of competing claims of possession.

21. In the instant case, the plaintiff's claim was directed at the deceased defendant for illegal intrusion onto the suit property in the year 2013 and therefore, upon his demise, it was proper for him to sue his estate. A reading of his claim shows he never made any claims against Kikumbi, and there was nothing wrong with him seeking declaratory relief over the suit property, which is unregistered land ostensibly under his name. Therefore, this court finds that the deceased defendant's administrators were properly intitled in these proceedings.

22. Regarding the assertion that the suit is time-barred, this court disagrees with the deceased defendant's position. Trespass constitutes a tortious act, and pursuant to **Section 4(2)** of the **Limitation of Actions Act**, it is to be instituted within three years from the date the cause of action arose. In the present case, the plaintiff alleged that the cause of action accrued in 2013 and filed the suit in 2014, which is well within three years from the alleged date of accrual. Therefore, this court concludes that the suit is not barred by the passage of time and further affirms its jurisdiction to hear and determine the matter.

***b. Whether the plaintiff proved his trespass claim.***

23. Respecting this issue, this court, in dealing with the first issue, delineated the pertinent legal framework on trespass. Significantly, **Article 40** of the **Constitution** recognises that every person has the right to acquire and own property of any kind and in any location within Kenya. In the instant case, the plaintiff presented several documents to prove that he was the owner of the suit property, which is unregistered land.

24. Concerning this matter, the legislation concerning unregistered land, in contrast to registered and surveyed land, lacks complete clarity. Consequently, the proof of ownership is established through documentary evidence, which forms the fundamental basis of ownership of the properties in question. In such circumstances as the present case, courts typically rely on the evidence provided by the authors of various documents who have attributed ownership to different parties. This position was reaffirmed by the decision in **Caroline Awinja Ochieng & another v. Jane Anne Mbithe Gitau & 2 others [2015] KEHC 4896 (KLR)**, which articulated as follows: -

***“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land***

*and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.*

*The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.”*

25. Accordingly, the evidential burden rested with the plaintiff, as the person alleging, to prove his claim, as provided by **Sections 107** and **109** of the **Evidence Act**. Turning to the plaintiff’s documents, he presented an agreement for sale

dated 20 April 1980, which neither he nor the Kitumbi had signed. Significantly, and in agreement with the deceased defendant, prior to amendments to **Section 3(3)** of the **Law of Contract Act**, which became operative from 1 June 2003 by dint of **Statute Law (Misc. Amendments) No. 2 of 2002**, the repealed **Section 3(3)** of this **Act**, which applied to the alleged agreement for sale, provided thus: -

***“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it, provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract -***

***(i) Has in part performance of the contract taken possession of the property or any part thereof or***

***(ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”*** Emphasis added.

26. From the evidence, it is undisputed that the plaintiff authorised PW2 to execute the agreement on his behalf. However, that could not be said of Kikumbi. There is no record of him ever executing this agreement. The court was informed that this was because he could not read and write, and that he allegedly authorised one Joseph Mutua Nzuni to execute it on his behalf. The court was also informed that this representative was not a relative of Kikumbi.

27. Nevertheless, there is no evidence of such an authorisation. In fact, the agreement describes Joseph Mutua Nzuni as an alleged witness of Kikumbi, rather than his representative. All payments of the purchase price, totalling Kshs. 5,000/-, leaving a balance of Kshs. 1000/- was similarly made to this gentleman. There is no evidence that Kikumbi was ever paid the purchase price. It was expected that the plaintiff would have summoned this alleged gentleman to testify and substantiate his case, but he did not do so.

28. Moreover, PW3 testified that in 1999, he convened a meeting whereby Kikumbi conceded to the terms of the agreement; nonetheless, the minutes of such a meeting were never tendered to substantiate it. Consequently, this court finds that this agreement contravened **Section 3(3)** of the **Law of Contract Act**, as Kikumbi never signed it. As held in **Okoth v Nyaberi & another [2024] KECA 427 (KLR)**, it finds that the agreement is unenforceable. It also finds that

Joseph Mutua Nzuni was not authorised to sign the agreement. It also finds that the purchase price was never paid to Kikumbi. It also finds that it is uncertain how the County Government of Machakos recorded the plaintiff as the unregistered owner of the suit property.

29. Respecting possession, the plaintiff's testimony was contradictory, and he never demonstrated by way of evidence his developments in the suit property. In consequence, this court finds that his testimony was untruthful, unreliable, and unsubstantiated. It also finds that he did not prove his claim of trespass.

**c. Whether the deceased defendant specifically pleaded fraud and, if so, whether he proved it.**

30. Concerning this matter, it is a well-established legal principle that allegations of fraudulent conduct must be explicitly pleaded in accordance with **Order 2 Rule 4** of the **Civil Procedure Rules**. Upon review of the amended defence and counterclaim, it is apparent that fraud was invoked as a defence to the plaintiff's claim of trespass, rather than being clearly pleaded as an independent cause of action against the plaintiff. It was expected that such a claim would have been articulated within the counterclaim, which represents a separate claim by the deceased defendant against the plaintiff; however, for reasons best known to him, this was not

done. Hence, this court finds that fraud was not specifically pleaded.

**d. Whether the defendant specifically pleaded illegality and proved it.**

31. In accordance with **Order 2 Rule 4** of the **Civil Procedure Rules**, the deceased defendant specifically pleaded illegality over 1232 against the plaintiff in the counterclaim, which is registered land. Such a claim was properly before this court, as **Sections 24** and **25** of the **Land Registration Act** acknowledge the registered owner as the absolute owner of the land and provide protection under **Section 24**.
32. Notwithstanding that the counterclaim was not defended, the evidential burden rested on the deceased defendant to prove his claim. Furthermore, reliance solely on inference from the facts to establish illegality was not permitted. In **Koinange and 13 others v Koinange [1986] KLR 23**, which has been cited in several court decisions which this court associates with, the court reaffirmed the fundamental principle of the law of evidence that he who alleges must prove.
33. In this case, the defendants' counterclaim as plaintiffs is presented in their capacity as legal representatives of the estate of the deceased defendant. However, the deceased defendant is neither the registered owner of 1232 nor does he

possess any registered interest therein; rather, Kikumbi holds such interest.

34. Suffice it to say, 1232 is the free property of Kikumbi and is likely subject to probate proceedings in **Machakos HCSC 749 of 2013**, and as per the provisions of **Section 82 (a)** of the **Law of Succession Act**, the plaintiff's to the counterclaim could only sue over 1232 in their capacity as Kikumbi's legal representatives, and not otherwise. Therefore, the court hereby finds that the counterclaim is legally incompetent.

35. This finding notwithstanding, and in determining this claim on the merits, this court finds that, in the absence of proof that 1232 has ever been subdivided to create the suit property, as its title document is intact, this court finds that the deceased defendant failed to prove his counterclaim.

36. In light of the above reasons and findings, this court finds that neither the plaintiff nor the deceased defendant proved their respective cases to the required standard. Both the plaintiff's claim and the deceased defendant's counterclaim are dismissed. Since each party was unsuccessful, they shall bear their respective costs of the plaintiff's suit and the counterclaim.

Judgment accordingly.

**Delivered and Dated at Machakos this 5<sup>th</sup> day of May,  
2026.**

**HON. A. Y. KOROSS  
JUDGE  
05.05.2026**

**Judgment delivered virtually through Microsoft Teams  
Video Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant

Miss Munywoki for Dr. Musau for plaintiff.

No appearance for defence.