



**Ruto (Suing as legal representative of the estate of Kipruto Arap Maina) v Towett (Sued In Her Own Capacity As Administrator Of The Estate Of John Towett Mosonik) (Environment & Land Case 123 of 2017) [2024] KEELC 208 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 208 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 123 OF 2017  
MC OUNDO, J  
JANUARY 25, 2024**

**BETWEEN**

**JOHN KORIR RUTO ..... PLAINTIFF  
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF KIPRUTO ARAP  
MAINA**

**AND**

**AGNES CHEROP TOWETT ..... DEFENDANT  
SUED IN HER OWN CAPACITY AS ADMINISTRATOR OF THE ESTATE OF  
JOHN TOWETT MOSONIK**

**JUDGMENT**

1. Vide a Complaint dated 17<sup>th</sup> November, 2017, the Plaintiff herein had stated that his father, the late Kipruto Arap Maina had been the writer of parcel of land No. Kericho/Kyogong/13 measuring approximately 2.2 hectares. That on or about the 21<sup>st</sup> January 1988 the deceased John Towett Mosonik had fraudulently caused the said parcel of land to be subdivided into two resulting into No. Kericho/Kyogong/809 measuring approximately 1.4 hectares and No. Kericho/Kyogong/810 measuring approximately 0.8 hectares whereby he had proceeded to register No. Kericho/Kyogong/810 in his name despite the fact that his father and their family have been in occupation and use of the whole land No. Kericho/Kyogong/809 and 810 since or about 1965. That he had only discovered the fraud in October 2017 when he had conducted a search in preparation for subdividing the land.
2. The Plaintiff sought for the following orders;
  - i. A declaration that Land Parcel No. Kericho/Kyogong/810 is part of the estate of Kipruto Arap Maina.
  - ii. Revocation and/or cancellation of title deed for Land Parcel No. Kericho/Kyogong/810.



- iii. A perpetual order restraining the Plaintiff (sic) by herself, her agents and/or servants from entering, remaining, trespassing or in any way interfering with Land Parcel No. Kericho/Kyogong/810.
  - iv. Costs of the suit
  - v. Any other or further relief that the Court may deem fit and just to grant.
3. The Defendant filed a Statement of Defence and a Counterclaim dated 8<sup>th</sup> February, 2018 wherein she denied the contents of the Plaint putting the Plaintiff to strict proof thereof. She stated that she was not an administratrix of the estate of the deceased John Towett Mosonik but rather, the lawful registered and indefeasible proprietor of Land Parcel Number Kericho/Kyogong/810 measuring 0.8 hectares. That the deceased Kipruto Arap Maina who had owned land Parcel Number Kericho/Kyogong/13, had lawfully sold a portion of it her deceased husband John Towett Arap Mosonic. That subsequently her husband's portion had been surveyed, demarcated and a title deed No. Kericho/Kyogong/810 measuring 0.8 hectares (the suit land herein) issued legally and lawfully wherein they had fenced off the said portion and taken occupation, possession and use of the entire portion for over 37 years whereas the Plaintiff lived and occupied the adjacent parcel of land No. Kericho/Kyogong/809. The Defendant had contended that the Plaintiff's suit was time barred.
4. In her counter claim, she had denied the particulars of fraud attributed to the deceased John Towett Mosonik in the Plaint stating that in December, 2017, the Plaintiff (now Defendant) and his children, without any colour of right had destroyed her fence and fully encroached and trespassed onto the entire suit land. She had thus sought for the following orders:
- i. A declaration that Land Parcel No. Kericho/Kyogong/810 measuring 0.8 hectares was lawfully acquired by the Defendant's (now Plaintiff) husband and thereby lawfully registered, thus the same belongs to the Defendant (now Plaintiff).
  - ii. An order of eviction against the Plaintiff (now Defendant), his servants, representatives, assigns and heirs from the portion of Land Parcel No. Kericho/Kyogong/810 measuring 0.8 hectares which they have illegally encroached on.
  - iii. Mense profits
  - iv. Costs of the suit.
  - v. Any other remedy the court may deem fit to grant.
5. Vide his Reply to Defence and Defence to Counter-claim, the Plaintiff denied each and every allegation of facts set out there in putting the Defendant to strict proof of the allegations and sought that his suit be allowed as prayed and the Defendant's defence and Counter-claim be dismissed.
6. Despite the matter having been certified ready for hearing on 11<sup>th</sup> April, 2018, it did not proceed wherein the Defendant sought for the Plaintiff's suit to be dismissed and/or struck for being time barred as per the provisions of Sections 7, 8 and 26 of the *Limitation of Actions Act*. Vide a ruling dated 29<sup>th</sup> July, 2021, the Defendant's Preliminary Objection was allowed in its entirety wherein the Plaintiff's suit was struck out with costs.
7. Subsequently, on 24<sup>th</sup> November, 2021, directions were taken for the Defendant's Counter-claim to proceed for hearing. The Plaintiff's Counsel then sought vide his application dated the 1<sup>st</sup> July, 2022 to cease acting for his client which application had been on 11<sup>th</sup> October, 2022 and the law firm of M/s Rubua Ngure & Advocates was released from acting for the Plaintiff.



8. The Plaintiff had been granted leave to file his Notice to act in person or instruct another counsel to act for him within 21 days but he neither filed the said Notice to act in person nor instructed another counsel to act for him.
9. The matter then proceeded for hearing ex parte, on the Defendant's Counter-claim on 4<sup>th</sup> July, 2023 wherein the Defendant herein, Agnes Cherop Towett testified as PW1 (in Counter-claim) to the effect that she lived in Bomet and was a farmer. That she was in court because the children of the deceased Kipruto Arap Maina had sued her. That after her husband John Towett Mosonik passed away in the year 2015, the children of Kipruto Arap Maina had removed the fence on the boundary of their land and started encroaching on to their land.
10. That she had reported the matter to her counsel wherein they filed a Defence and Counter-claim. She adopted her Witness Statement dated 23<sup>rd</sup> May, 2018 as her evidence in chief then proceeded to testify that her husband, John Towett Mosonik bought a portion of land comprised in No. Kericho/Kyogong/13 from Kipruto Arap Maina vide a sale Agreement (written in Kipsigis Language) dated 15<sup>th</sup> December 1976 which sale had been witnessed by some witnesses. She produced the said Agreement as Pf Exhibit 1. She proceeded to testify that subsequently there had been a second agreement written in English language dated 15<sup>th</sup> December, 1976 which was a continuation of the first agreement. She produced the second agreement as Pf Exhibit 2.
11. Her evidence was that the parcel of land husband had bought measured 0.8 hectares which is approximately 2 acres and that the same was to be excised from land parcel No. Kericho/Kyogong No.13. That after the purchase, her husband then processed the title and had been issued with title No. Kericho/Kyogong /810 (the suit land herein) while the owner (Kipruto Arap Maina) had remained with title No. Kericho/Kyogong 809. She produced a copy of the title deed for Parcel No. Kericho/Kyogong /810 registered in the name of John Towett Mosonik as Pf Exhibit 3.
12. She proceeded to testify that they had taken possession/occupation of the suit land immediately they bought it and had paid for the title deed at M/s Mitei Advocate, C K Kositany Advocates wherein they had been issued with the receipts. She produced the bundle of receipts as Pf exhibits 4 (a-f).
13. Her further evidence was that while they were living on the suit land, there arose a dispute in the year 1981 in relation to some money. The matter was referred to the chief and the District Officer wherein it had been settled in their favour to the effect that they continue to occupying the suit land. She produced the correspondence letters written by the Chief & District Officer being a Letter dated 27<sup>th</sup> June 1980, an observation and Judgement by the District Officer dated 14<sup>th</sup> January 1981 and a Land Dispute proceedings letter dated 14<sup>th</sup> January, 1981 as Pf Exhibit 5 (a – c).
14. She maintained that they had continued living on the suit land with her husband but upon his, the children of the deceased Kipruto Arap Maina had removed her fence and when she reported them, she had been advised to change the name on the title to the suit land. That subsequently, she had filed a Succession Cause and was issued with a Grant of Letters of Administration dated 21<sup>st</sup> November 2016 which she produced as Pf Exhibit 6 (a). That the Grant had been subsequently confirmed as per the Certificate of Confirmation of Grant dated 19<sup>th</sup> September, 2017 which Certificate she produced as Pf Exhibit 6 (b).
15. She confirmed that the suit land, No. Kericho/Kyogong/810 had been listed in the said Certificate of Confirmation of Grant wherein afterwards she had been issued with a title deed in her name. She produced a copy of the said title deed bearing her name of Agnes C. Towett issued on 3<sup>rd</sup> October, 2017 as Pf Exhibit 7. She later obtained a Green Card, dated 3<sup>rd</sup> November 2017, in relation to land parcel



No. Kericho/Kyogong/810 from the Bomet/Kericho land Registry, which Green Card she produced as Pf exhibit 8.

16. Her evidence was that John Kipkorir Ruto (the Plaintiff herein) was a son to the vendor of the suit land. That John's lawyer had written a demand letter to her but at the time, she had refused comply with what he had sought of her. Consequently, she had responded to the said lawyer vide a letter dated 13<sup>th</sup> November 2017 which letter she produced as Pf exhibit 9.
17. She proceeded to testified that after her husband died in May 2015, the children of the vendor started uprooting her fence and encroaching on the land steadily until they got into the whole land. That at the time, she was still using the land but when the instant matter was filed in court, all parties had been asked to stop using the suit land. She testified that whereas she had complied with the court order, the Plaintiff (in the main suit) had defied the orders and had still been using the said suit land.
18. She thus sought that the Plaintiff (in the main suit) be evicted from her land, she be granted costs for the suit as well as damages because before the filing of the suit herein, she had been using the suit land to graze her cows and feed her children. Subsequently the Plaintiff had cut down her Cyprus trees. She thus closed her case.
19. Despite directions that party's file their submissions within 30 days wherein a mention date had been slated for the 20<sup>th</sup> September 2023 to confirm compliance, there had been no appearance by either party. The matter had then been slated for mention on 2<sup>nd</sup> November 2023 on which day, the Plaintiff's Counsel in counter-claim had committed to file their submissions within 7 days. Leave had been granted accordingly but there had been no compliance.

#### **Determination.**

20. I have considered the matter before me as well as the evidence adduced in court and the applicable law. I have also considered the fact that this matter proceeded ex-parte for the hearing of the Defendant's Counter-claim after the Plaintiff's suit was struck out for being time-barred. I have also considered the fact that the Plaintiff in the main suit failed to participate in the prosecution of the Defendant's Counter-claim.
21. The Defendant's case (Plaintiff in the counterclaim) which was undefended, was to the effect that on 15<sup>th</sup> December 1976, the deceased Kipruto Arap Maina who was the proprietor of Parcel of land No. Kericho/Kyogong/13, had lawfully sold a portion of it her deceased husband John Towett Arap Mosonic. That subsequently her husband's portion had been surveyed, and the land demarcated resulting into two portions of land being No. Kericho/Kyogong/809 and 810. Her husband was registered to parcel No. Kericho/Kyogong/810 measuring 0.8 hectares (the suit land herein) and issued with a title. That they had then fenced off the said portion and taken occupation, possession and use of the entire portion whereas the Plaintiff (in the main suit) had lived and occupied the adjacent parcel of land No. Kericho/Kyogong/809.
22. That upon the death of her husband in the year 2015, she had filed a Succession Cause where she had been issued with a Grant of Letters of Administration dated 21<sup>st</sup> November 2016 which Grant had subsequently been confirmed on 19<sup>th</sup> September, 2017 and she was registered as proprietor of the suit land and title was issued on 3<sup>rd</sup> October 2017. That it had been after her husband's death that the vendor's children, the Plaintiff in the main suit being one of them, uprooted her fence and encroached on the land steadily until they got into the whole land. She thus sought for their eviction and a declaration that she had lawfully acquired Land Parcel No. Kericho/Kyogong/810 measuring 0.8 hectares.



23. I find the issues that stand out for determination in the counterclaim as being;
- i. Whether Land Parcel No. Kericho/Kyogong/810 measuring 0.8 hectares was lawfully acquired by the Defendant's (now Plaintiff's) husband and thereby lawfully registered.
  - ii. Whether the Plaintiff (now Defendant) should be evicted from Land Parcel No. Kericho/Kyogong/810 measuring 0.8 hectares
  - iii. Who should pay the costs
24. It is trite law that the foundation of ownership to land is the registration of the same as its proprietor and issuance of a title deed that is free of any illegality, fraud and un-procedural practices and misrepresentation. Indeed, it is not enough to dangle a title.
25. The Court of Appeal in the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR, held as follows:
- “We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
26. It was also held in the case of *Republic v. Senior Registrar of Titles Ex-parte Brookside Court Limited* [2012] eKLR, that statutorily, the sanctity of title to land is assured and protected under Section 24, 25 and 26 of the *Land Registration Act* 2012 produced as herein under’;
27. Section 24 stipulates as follows:
- (a) 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.
28. Section 25 of the *act* provides:
- (1) The rights of a proprietor, whether acquired on 1st registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
    - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
    - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
  - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.



29. Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

(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.

30. One of the ingredients of impeaching the title of an owner of property on the grounds of fraud or misrepresentation is that the owner has to be proved to have been party to the acts of fraud and misrepresentation.

31. From the facts of the case as herein cited above, the green card to parcel of land No. Kericho/Kyogong/810, herein produced as Pf exhibit 8, in the absence of contrary evidence from either the Plaintiff in the main suit, or a custodian of documents, it is clear that indeed the title was transferred from Kipruto Arap Maina, to the Defendant's (now Plaintiff) husband John Towett Mosonik and later to the Defendant (now Plaintiff) through transmission. Indeed, I find that in the absence of proof that the Defendant (now Plaintiff) had obtained her respective Title Deed fraudulently, or by misrepresentation or through a corrupt scheme, the said Defendant's (now Plaintiff) title to the suit land is indefeasible.

32. Having earlier on found that the Defendant (now Plaintiff) had indeed satisfied the legal provision that her deceased husband was the proprietor of the suit land No. Kericho/Kyogong/810 which title was transferred to her by transmission, I find that she had thus acquired absolute ownership including all rights and privileges appurtenant to it. She was therefore entitled to quiet, peaceful possession and enjoyment of the ownership rights of the subject parcel of land. By uprooting the Defendant's (now Plaintiff) fence and encroaching on the suit land steadily until they got into the whole land without her authorization and/or consent, it goes without saying that the Plaintiff (now Defendant) was a trespasser on the said parcel of land.

33. Trespass has been defined by the 10<sup>th</sup> 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.”

34. Section 3 (1) of the *Trespass Act*, also 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.”



35. In this case the Defendant (now Plaintiff) has not adduced any evidence as to the state or value of her property before and after the trespass but had testified that she used to use the suit land for grazing her cows and feeding her children but the Plaintiff (now Defendant) had cut down her Cyprus trees.
36. In *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR the court 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 v Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).
37. In the case of *Willesden Investments Limited v Kenya Hotel Properties Limited* NBI H.C.C. NO. 367 of 2000, it had been held thus:  
“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case.”
38. The Defendant (now Plaintiff) had also sought for Mense profits.
39. Section 2 of the *Civil Procedure Act* 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;’
40. Order 21 Rule 13 of the *Civil Procedure Rules* on the other hand provides as follows: -
- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—
    - (a) for the possession of the property;
    - (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
    - (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
      - (i) the delivery of possession to the decree-holder; (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or
      - (iii) the expiration of three years from the date of the decree, whichever event first occurs.
  - (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.
41. I note that except for pleading mesne profits, the Defendant (now Plaintiff) did not furnish the court with any evidence on the period the Plaintiff (now Defendant) had been on the suit property, the extent of encroachment and the loss she had suffered.



42. In the case of *Peter Mwangi Mbutia & another v Samow Edin Osman* [2014] eKLR, the Court of Appeal while dealing with the issue of mesne profits had held as follows:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

43. Based on the evidence placed before me and while associating myself with the legal provisions and decisions cited above, I find that the Defendant (now Plaintiff) had failed to discharge her burden of proof to prove that she is indeed entitled to a claim of mesne profits and I will decline to award her the same.

44. The summation of my finding is therefore that the Defendant (now Plaintiff) has proved her Counter-claim against the Plaintiff (now Defendant) on a balance of probabilities hence judgment is herein entered in her favour as prayed to wit;

- i. A declaration is hereby issued that Land Parcel No. Kericho/Kyogong/810 measuring 0.8 hectares was lawfully acquired by the Defendant’s (now Plaintiff’s) husband and is thereby lawfully registered, thus the same belongs to the Defendant (now Plaintiff).
- ii. The Plaintiff (now Defendant) shall by himself and any other person claiming through them vacate forthwith from land parcel LR No. Kericho/Kyogong/810 measuring 0.8 hectares within 30 days upon delivery of this judgment and if they fail to so vacate, an order of eviction be issued against him/them.
- iii. The Defendant (now Plaintiff) is herein awarded general damages of Ksh. 100,000/= (one hundred thousand)
- iv. Costs of the Counter-Claim at a lower scale since the same was undefended,
- v. Interest on clause (iii) above to be computed after 30 days from the date of delivery of this judgment.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

