



**Odiwuor & another (Suing as the administrator of the Estate of Elias Obura Ndege) v Lake Basin Development Authority; Kisumu County Land Registrar (Third party) (Environment & Land Case 866 of 2015) [2025] KEELC 1005 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 1005 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 866 OF 2015  
SO OKONG'O, J  
FEBRUARY 27, 2025**

**BETWEEN**

**ROLAND ODIWUOR ..... 1<sup>ST</sup> PLAINTIFF**

**JAQUELINE OSAWA OBURA ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF ELIAS OBURA  
NDEGE**

**AND**

**LAKE BASIN DEVELOPMENT AUTHORITY ..... DEFENDANT**

**AND**

**KISUMU COUNTY LAND REGISTRAR ..... THIRD PARTY**

**JUDGMENT**

**The pleadings**

1. Elias Obura Ndege, deceased (hereinafter referred to only as “the deceased”), filed this suit on 20<sup>th</sup> December 2005 in the High Court at Kisumu as Kisumu HCCC No. 155 of 2005. The suit was transferred to this court in 2015 and given its current case number. The plaint was amended on 8<sup>th</sup> July 2014. In his amended plaint, the deceased averred that he was the registered proprietor of all that parcel of land known as Kisumu/Tonde/135 (hereinafter referred to as “the suit property”) and that on 24<sup>th</sup> November 2005, the Defendant’s employees went to the suit property and removed the beacons showing the demarcations of the said parcel of land making the deceased to incur extra expenses in engaging the services of a surveyor to place new beacons on the property.
2. The deceased averred that on or about 30<sup>th</sup> November 2005, the deceased hired a tractor to plough the suit property but was barred from ploughing the same by the Defendant’s employees without any



reasonable cause. The deceased averred that on 7<sup>th</sup> December 2005, he again hired a tractor to plough the suit property, but the Defendant's employees led by one, Joshua Obade stopped the tractor from ploughing the land making the deceased to incur extra expenses. The deceased averred that he spent a total of Kshs. 10,000/- on hiring the tractor which was prevented from ploughing the suit property by the Defendant's employees. The deceased prayed for judgment against the Defendant for:

- a. An order of a temporary injunction restraining the Defendant by itself, its agents and/or servants from interfering with the deceased's quiet possession and enjoyment of the suit property.
  - b. An order of a permanent injunction restraining the Defendant by itself, its agents and/or servants from interfering with the deceased's quiet possession and enjoyment of the suit property.
  - c. General damages for trespass.
  - d. Costs and interests.
  - e. Mesne profits from the date of filing of the suit until the suit is determined.
3. The Defendant entered appearance and filed a defence and a counterclaim on 17<sup>th</sup> March 2006. The Defendant averred that the registration of the deceased as the proprietor of the suit property was obtained illegally and that the register of the suit property should be rectified to cancel the same. The Defendant averred that at the time of registration of the deceased as the owner of the suit property, the deceased had actual and constructive notice of the Defendant's actual and constructive use and occupation of the property and that the deceased was under a duty to make inquiry of the rights of the Defendant in respect thereof. The Defendant averred that the registration of the deceased as the owner of the suit property was obtained by fraud and/or collusion and/or misrepresentation. The Defendant averred that it was justified in preventing the deceased from using the suit property since the property was irregularly and illegally excised from a parcel of land belonging to the Defendant.
  4. The Defendant averred that at all material times, there existed in the immediate neighborhood of Muhoroni Township a parcel of land described only as Veterinary Holding Ground measuring about 324 acres belonging to the Government of the Republic of Kenya. The Defendant averred that it was a state corporation established under the *Lake Basin Development Authority Act*. The Defendant averred that on or about 1986, Kisumu District Development Committee recommended to the Government of Kenya that the said parcel of land be given to the Defendant to establish a research center for livestock development whose principal objective was to produce high-quality grade livestock for farmers in the locality at a subsidized price.
  5. The Defendant averred that, acting on the said recommendation, the Ministry in charge of livestock development surrendered the said parcel of land to the Defendant, which proceeded to establish a livestock multiplication center thereon. The Defendant averred that it had occupied and used the parcel of land since 1986.
  6. The Defendant averred that the provincial administration and local leaders thereafter approached the Defendant and asked it to agree to the excision of about 80 acres of the Defendant's said parcel of land to facilitate the settlement of squatters. The Defendant averred that after that request, the provincial administration made another request that while the squatters were being settled, certain persons who had been displaced by the construction of the District Headquarters at Awasi be also settled on the Defendant's said land.



7. The Defendant averred that it agreed in principle to allow about 80 acres to be excised from its said parcel of land but insisted that the Defendant had to be involved at every stage to ensure that only deserving persons benefit from the Defendant's concession. The Defendant averred that it also insisted that the excision of the said 80 acres must not interfere with its activities on the said parcel of land.
8. The Defendant averred that without involving the Defendant, the provincial administration and the Ministry of Lands officials colluded with several undeserving persons, including the deceased and excised a substantial chunk of the Defendant's land, leaving the Defendant with land measuring 38.5 acres only. The Defendant reiterated that the registration of the deceased as the owner of the suit property was illegal and should be cancelled. The Defendant sought judgment in its counterclaim against the deceased for;
  - a. A declaration that the deceased's registration as proprietor of the suit property was illegal, null and void.
  - b. Rectification of the register.
9. The deceased filed a reply to defence and defence to counterclaim in which he denied the Defendant's claim. The deceased died on 7<sup>th</sup> June 2021 and was substituted with Roland Odiwuor and Jaqueline Osawa Obura as the Plaintiffs through a further amended plaint filed on 15<sup>th</sup> March 2023.
10. On 12<sup>th</sup> October 2009, the Defendant was granted leave to add the Commissioner of Lands and the Chief Land Registrar as defendants to its counterclaim. The Defendant did not however amend its defence and counterclaim to add the two as parties to the suit. On 1<sup>st</sup> March 2016, the Defendant was granted leave to serve a third-party notice upon the Kisumu County Land Registrar. The Defendant took out a third-party notice and served the same upon the Kisumu County Land Registrar, who entered appearance on 26<sup>th</sup> September 2016 through the Attorney General.

#### **The evidence by the plaintiff**

12. The Plaintiffs called Jaqueline Osawa Obura(PW1) as their sole witness. PW1 told the court that the deceased was her father. PW1 adopted the witness statement of the deceased filed on 20<sup>th</sup> November 2012 as her evidence in chief. She produced the documents attached to the deceased's list of documents dated 9<sup>th</sup> June 2006 as P.EXH.1 to 5 and the documents attached to the deceased's additional list of documents filed on 7<sup>th</sup> February 2020 as P.EXH.6 to 11. Finally, PW1 produced a copy of a letter dated 13<sup>th</sup> January 2006 as P.EXH.12. PW1 urged the court to grant the reliefs sought in the deceased's amended plaint as prayed.
13. On cross-examination by the advocate for the Defendant, PW1 told the court that she was not conversant with her deceased father's claim over the suit property. PW1 stated that what she knew was that the deceased had a title to the suit property. She stated that she did not know how the deceased acquired the suit property. On cross-examination by the advocate for the third party, PW1 stated that she did not know what her deceased father was doing on the suit property. On examination by the court, PW1 stated that she had never been to the suit property. PW1 stated that her deceased father was living in Chemelil and was working with KRA before he retired and became a farmer. She stated that her co-plaintiff was her brother.

#### **The evidence by the Defendant**

14. The Defendant also called one witness, Michael Okello Okul (DW1). DW1 told the court that he was the Defendant's Deputy Director of Legal Services and had worked with the Defendant since 1986.



DW1 adopted the witness statement of David Njogu Mutuota filed in court on 7<sup>th</sup> October 2019 as part of his evidence in chief. DW1 produced the documents attached to the Defendant's list of documents dated 13<sup>th</sup> June 2006 as a bundle as D.EXH.1. DW1 stated further as follows: The land that was initially allocated to the Defendant measured 345 acres, which was Government Land used for Veterinary Holding Ground. The Defendant was allocated the land for the same purpose. As at the time of his evidence, the Defendant was only occupying land measuring 130 acres. After the land measuring 345 acres was allocated to the Defendant as aforesaid, the District Development Committee held a meeting in 1982 or thereabouts which was attended by other stakeholders at which meeting it was agreed that the Defendant would retain land measuring 130 acres and the rest of the land initially measuring 345 acres would be given to other parties. The squatters, who were 125 in number, were to get land measuring 130 acres. The deceased was not one of the squatters and was also not one of the people who were displaced at Awasi who were to get a portion of the land measuring 60 acres. DW1 stated that the suit property claimed by the deceased was allegedly swapped with someone who owned Plot No. 129. DW1 stated that the suit property was within the land measuring 130 acres that was reserved for the Defendant's use from the original land measuring 345 acres. He stated that the suit property was in the Defendant's active use. He urged the court to dismiss the Plaintiffs' suit and to allow the Defendant's counterclaim.

15. On cross-examination by the Plaintiffs' advocate, DW1 stated that the land in dispute initially belonged to the Government of Kenya and was being used as Veterinary Holding Ground. He stated that the land, which measured 345 acres, was thereafter allocated to the Defendant. He stated that a meeting of the District Development Committee was thereafter held, at which it was resolved that the Defendant would retain only a portion measuring 130 acres of the original land measuring 345 acres. It was further resolved at the meeting that a portion of the said land measuring 130 acres would be allocated to the squatters. The meeting also resolved that a portion of the land measuring 60 acres would be allocated to those who were displaced at Awasi, and another portion measuring 25 acres would be reserved for public utilities. DW1 stated that the Defendant had no problem with the decision of the District Development Committee that reduced the size of the land that was initially allocated to the Defendant. He stated that the person from whom the deceased acquired the suit property was neither a squatter nor a person who was displaced at Awasi. He stated that the deceased was not allocated any land. He stated that the deceased claimed to have swapped the land with someone. DW1 admitted that the deceased was the registered owner of the suit property. DW1 stated that they were challenging the deceased's title because the land being claimed by the deceased was inside the land measuring 130 acres that was allocated to the Defendant. He stated that he had a survey report showing that the suit property was inside the Defendant's land. He stated that the Defendant was using the suit property for a solar irrigation project for the community and that they had occupied the property since 1986.

### **The submissions**

16. The 3<sup>rd</sup> Party did not call evidence. After the close of evidence, the court directed the parties to make closing submissions in writing. The Plaintiff filed undated submissions on 19<sup>th</sup> July 2024. The Defendant filed submissions dated 2<sup>nd</sup> May 2024 while the 3<sup>rd</sup> Party filed submissions dated 27<sup>th</sup> August 2024.

### **Analysis and determination**

17. I have considered the pleadings, the evidence tendered, and the submissions by the advocates for the parties. The issues arising for determination in this suit are the following;



1. Whether the deceased, Elias Obura Ndege, was the lawful proprietor of all that parcel of land known as Kisumu/Tonde/135(suit property);
2. Whether the Defendant trespassed on the suit property;
3. Whether the Plaintiffs are entitled to the reliefs sought in the further amended plaint;
4. Whether the Defendant is entitled to the reliefs sought in its counterclaim and third-party notice; and
5. Who is liable for the costs of the suit?

**Whether the deceased, Elias Obura Ndege, was the lawful proprietor of all that parcel of land known as Kisumu/Tonde/135(suit property)**

18. The suit property was registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). The Registered *Land Act* was repealed by the *Land Registration Act*, 2012. Sections 27 and 28 of the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed), provide as follows:

“

“27. Subject to this Act-

- 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;
- 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 and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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. unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

19. The two sections have been reproduced in Sections 24 and 25 of the *Land Registration Act*, 2012 as follows:

“24. Subject to this Act—



- 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.

25.

- (1) The rights of a proprietor, whether acquired on first 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.”

20. Section 26(1) of the *Land Registration Act*, 2012 provides as follows:

“26.

- (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.”



21. In *Munyū Maina v. Hiram Gathiba Maina Civil Appeal No. 239 of 2009*[2013] eKLR the court stated 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.”

22. In *Daudi Kiptugen v. Commissioner of Lands & 4 Others* [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

23. In *Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v. The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

24. In *Henry Muthee Kathurima v. Commissioner of Lands & Another* [2015] eKLR where the court held as follows:

“We have considered the provisions of section 26 of the *Land Registration Act* in light of the provisions of Article 40 (6) of *the constitution* and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of *the constitution*. We hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired.”

25. I am satisfied from the evidence on record that the Plaintiffs have proved that the deceased was the lawful owner of the suit property. The Plaintiffs’ case was that one, Dr. Thomas Obuba Aroka (hereinafter referred to as “Aroka”) was allocated a parcel of land known as Plot No. 129 within Muhoroni Settlement Complex by the Director of Land Adjudication and Settlement on 2<sup>nd</sup> May 1996. The Plaintiffs produced the letter of allotment in evidence. Through a letter dated 21<sup>st</sup> June 1996, Aroka sought the approval of the Director of Land Adjudication and Settlement to transfer his interest in the suit property to the deceased, Elias Obura Ndege, which approval was granted on 25<sup>th</sup> June 1996. The Plaintiffs produced the letter requesting approval, which had the approval endorsed thereon in evidence. The land reference number for the parcel of land that was allocated to Aroka was changed from Plot No. 129 to Plot No. 135. The Plaintiffs produced in evidence a receipt dated 28<sup>th</sup> June 1996 for the payment of Kshs. 3871.70 that was made by the deceased to the Settlement Fund Trustees on which there was an annotation regarding the change of the land reference number. The deceased was



registered as the owner of the suit property on 3<sup>rd</sup> November 2005 and was issued with a title deed on 17<sup>th</sup> November 2005. The Plaintiffs produced a copy of the title deed for the suit property in the name of the deceased in evidence. The Plaintiffs also produced in evidence a copy of the Registry Index Map (RIM) for Kisumu District Tonde Settlement Scheme, which showed that the suit property was in the said RIM. The Plaintiffs also produced in evidence a report dated 19<sup>th</sup> June 2012 by the Provincial Surveyor, Nyanza Province to the District Land Adjudication & Settlement Officer, Nyando District in which the Provincial Surveyor made a finding that the Defendant herein owned Land Parcels 113, 114, 115, 116 and 117 and that the Defendant was in possession of 38 other parcels of land that had been allocated to third parties which parcels of land included the suit property herein. The Plaintiffs also produced in evidence a copy of a letter dated 17<sup>th</sup> July 2012 by the Defendant to the District Land Adjudication & Settlement Officer, Nyando District in which the Defendant requested for an estimate of the funds that would be required by the Defendant to process titles for Land Parcels 113, 114, 115, 116 and 117.

26. I am satisfied from the foregoing that the deceased was lawfully registered as the owner of the suit property. The court is enjoined under Section 26(1) of the *Land Registration Act*, 2012 to take the deceased's title deed as conclusive evidence that the deceased is the absolute and indefeasible owner of the suit property unless it is proved that the title was acquired through fraud, misrepresentation, illegality, procedural impropriety or corrupt scheme. The Plaintiffs having produced the deceased's title deed in evidence in proof of the deceased's ownership of the suit property and having explained how the deceased obtained the title, the burden shifted to the Defendant who was challenging the title to prove the grounds for its impeachment mentioned above. As mentioned earlier in the judgment, the Defendant claimed in its defence and counterclaim that the deceased acquired the suit property irregularly and illegally through fraud, collusion and misrepresentation.

27. In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another*[2000]eKLR, the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

28. In *Railal Gordhanbhai Patel v. Lalji Makanji* [1957] E.A 314, the court stated as follows at page 317:

“Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

29. In *Virani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 E.A KLR 269, it was held that:

“Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.



30. In *Kampala Bottlers Ltd. v Damanico (UG) Ltd.* [1990-1994] E.A141(SCU), the Supreme Court of Uganda stated that:

“To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.”

31. In the particulars of fraud, collusion, misrepresentation, irregularity, and illegality pleaded in paragraph 9 of the defence, the Defendant claimed that the deceased misrepresented that he was landless, was displaced from his original home in Awasi, and was a genuine squatter. No evidence was placed before the court by the Defendant in proof of these alleged misrepresentations. The deceased was also accused of not inquiring from the Defendant whether it had any objection to the allotment of the suit property to the deceased. The deceased was not the allocating authority. The Defendant did not also establish that the suit property was part of the land measuring 130 acres that was reserved for its use. In any event, the alleged failure to consult the Defendant could not amount to fraud. It is my finding that the Defendant did not establish any valid ground for the impeachment of the deceased’s title to the suit property. The deceased was therefore the lawful owner of the suit property.

#### **Whether the Defendant trespassed on the suit property**

32. The Defendant cited the decision of the Court of Appeal, Fourth District, Division 1, California, in *Ralphs Grocery Co. v. Victory Consultants Inc.* (2017) 17Cal. App.5<sup>th</sup> 245, 261; CACI No. 2000 where the court stated that:

“In the instant action, Appellants have sued Respondents for trespass. “Trespass is unlawful interference with possession of property.” (*Staples v. Hoefke* (1987)189 Cal.App. 3d 1397,1406). The elements of trespass are: (1) the plaintiff’s ownership or control of the property; (2) the defendant’s intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant’s conduct was substantial factor in causing the harm.(See CACI No. 2000).”

33. The court has already made a finding that the deceased was the lawful registered owner of the suit property. In paragraphs 4, 5, 6, and 7 of the plaint, the deceased accused the Defendant of entering the suit property and interfering with the deceased’s use of the property. In its defence, the Defendant claimed that the said interference was justified in that the suit property was irregularly and illegally excised from the land that was owned by the Defendant. The burden of proving this justification was on the Defendant. At the trial and in its submissions, the Defendant claimed that the suit property was part of a larger parcel of land measuring 345 acres owned by the Government of Kenya of which the Defendant was given 130 acres. The Defendant claimed that the suit property was excised from the land measuring 130 acres that was reserved for its use by the Government. The Defendant placed no evidence before the court showing that the suit property was created from the land measuring 130 acres that was reserved for the Defendant. It is my finding that the Defendant’s entry and interference with the deceased’s use of the suit property was unlawful and as such amounted to trespass.

#### **Whether the Plaintiffs are entitled to the reliefs sought in the further amended plaint**

34. I have earlier in the judgment set out the reliefs sought by the Plaintiffs. The Plaintiffs have sought a permanent injunction to restrain the Defendant from interfering with their quiet possession and



enjoyment of the suit property, damages for trespass and mesne profits. From the findings above, I am satisfied that the Plaintiffs have proved their claim against the Defendant and, as such, are entitled to the reliefs sought. In their submissions, the Plaintiffs submitted that they were entitled to an award of Kshs. 2,000,000/- as general damages for trespass and Kshs. 5,000,000/- as mesne profits. For its part, the Defendant submitted that the Plaintiffs were not entitled to an award of damages.

35. In *Park Towers Ltd. v. John Mithamo Njika and 7 Others* 2014 eKLR, the court stated as follows:

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

36. In *Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 45 para. 26, 1503* the authors have stated as follows on assessment of damages for trespass:

- 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 an amount as would reasonably be paid for that use.
- d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased.”

37. The Plaintiffs proved that the Defendant unlawfully stopped the deceased from using his parcel of land. There is no doubt that the deceased suffered loss due to his inability to put the suit property which is agricultural land into use. I am of the view that an award of Kshs. 1,000,000/- as general damages would be reasonable compensation to the deceased’s estate for the loss occasioned by the Defendant’s trespass.

38. Concerning the claim for mesne profits, in *Rajan Shah T/A Rajan S. Shah & Partners v. Bipin P. Shah* [2016] eKLR the court stated as follows:

“The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.”



39. The Defendant admitted at the trial that it was in occupation of the suit property. I have held that the Defendant's occupation of the suit property is illegal. The Defendant which is in wrongful occupation of the suit property is liable to pay mesne profits to the Plaintiffs. The Defendant has been in occupation of the suit property since 2005, when it prevented the deceased from using it; that is a period of over 19 years. As mentioned earlier, the suit property is used for farming. I will award the Plaintiffs a sum of Kshs. 2,000,000/- as mesne profits.

#### **Whether the Defendant is entitled to the reliefs sought in its counterclaim and third-party notice**

40. The Defendant has not proved any wrongdoing on the part of the deceased. The Defendant has therefore failed to prove its counter-claim. The Defendant's third-party notice was premised on the ground that the title for the suit property was issued illegally. The court has found that the title was issued lawfully. There is, therefore, no basis for the indemnity sought by the Defendant against the 3<sup>rd</sup> Party.

#### **Who is liable for the costs of the suit?**

41. In Halbury's Laws of England, 4<sup>th</sup> Edition (Re-issue), [2010] Vol. 10, para 16 the authors have stated as follows:

“The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.

42. The Plaintiffs have proved their claim against the Defendant while the Defendant's counter-claim has not been proved. No reason has been given why the Plaintiffs should be denied the costs of the suit and the counterclaim. The 3<sup>rd</sup> Party is not entitled to costs as it did not tender any evidence at the trial. The Plaintiffs shall have the costs of the suit and the counterclaim.

#### **Conclusion**

43. In conclusion, I hereby enter judgment for the Plaintiffs against the Defendant for:

1. A permanent injunction restraining the Defendant by itself, its servants or agents from interfering with the Plaintiffs' quiet possession and enjoyment of all that parcel of land known as Kisumu/Tonde/135.
2. Kshs. 1,000,000/- being general damages for trespass.
3. Kshs. 2,000,000/- being mesne profits.
4. The Defendant's counterclaim is dismissed.
5. The Defendant's 3<sup>rd</sup> Party Notice is dismissed
6. Costs of the suit and the counterclaim.

**DATED AND DELIVERED AT KISUMU ON THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025**

**S. OKONG'O**



## **JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Anyumba for the Plaintiffs

Mr. Amaasa h/b for Mr. Mwangi for the Defendant

N/A for the 3<sup>rd</sup> Party

Ms. J. Omondi-Court Assistant

