



Association of Islamic Relief and Propagation of Wajir v Mulae & 9 others (Environment and Land Case Civil Suit 327 of 2012) [2025] KEELC 653 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 653 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE CIVIL SUIT 327 OF 2012
CA OCHIENG, J
FEBRUARY 20, 2025**

BETWEEN

**ASSOCIATION OF ISLAMIC RELIEF AND PROPAGATION OF
WAJIR PLAINTIFF**

AND

**MUTHUI MALOBE MULAE 1ST DEFENDANT
ALEX KYALO 2ND DEFENDANT
JONATHAN MUTISYA 3RD DEFENDANT
AMOS KILONZO 4TH DEFENDANT
BENJAMIN KIOKO NDUTA ALIAS (POWER 5TH DEFENDANT
FRANCIS NZIOKA WAMBUA 6TH DEFENDANT
JOSEPH MUHINDI MUTUAL ALIAS (KABULU 7TH DEFENDANT
PETER MWENDIA 8TH DEFENDANT
ROBER MUSYIMI 9TH DEFENDANT
WILSON MBITHI MUNGUTI ALIAS (KABATI 10TH DEFENDANT**

JUDGMENT

1. By a Plaint dated the 29th August 2012, the Plaintiff prays for judgment against the defendants jointly and severally for;
 - a. Permanent injunction by this honourable court restraining the defendants from remaining on, trespassing upon, wasting, constructing, selling, alienating, fencing off, interfering and/



or dealing in any manner whatsoever with land reference No. 20869 and the removal of the structures thereon at the defendants' cost.

- b. General damages
 - c. Damages for loss of use of property "profit mesne".
 - d. Costs of this suit.
2. The Defendants filed a Statement of Defence including Counterclaim dated the 1st October 2012 in which they sought for the following Orders:
- a. That the Hon. Court be pleased to order that the defendants have acquired a good title to land I.R NO. 67600 & LR No. 20869 through adverse possession.
 - b. That the Hon. Court be pleased to issue a permanent injunction restraining the plaintiff, plaintiff's agents, servants or anyone claiming through the plaintiff's title from disturbing and interfering with the peaceful occupation of the defendants.
 - c. Costs and interest of this suit.
3. The matter proceeded for hearing where the Plaintiff called one witness while the Defendants had two witnesses.

Evidence of the Plaintiff

4. The Plaintiff explained that it is a registered trust which acquired LR No. 20869 (6.0 hectares) in 1994, from the government of Kenya vide a Letter of Allotment, hereinafter referred to as the 'suit land'. He confirmed that they were assisted by their local Member of Parliament Hon. Ahmed Khalif (deceased), during the process of acquisition of the suit land. Further, that after the demise of their MP, one Mohamed Muktar and Abdi Osman Mohamed were appointed as new trustees and Gazetted vide Gazette Notice No. 8739 of 14th September 2007. It confirmed that subsequently, it invited Victoria Land Surveyors to carry out survey, which was completed in 1995 and a title was acquired, but it did not manage to fence the suit land due to lack of funds. The Plaintiff claimed in the year 2010, as it was preparing to fence the suit land, the said land was invaded by people who destroyed beacons, erected temporary structures thereon and forcefully threatened to beat its director and evict them. Further, that the matter was reported to Mlolongo Police Post vide OB 24/22/2009. It was its contention that on 1st October, 2010, it acquired approval from Municipal Council of Mavoko to fence the suit land. Further, that they got officers to accompany them, to the suit land but they encountered chaos, prompting them to file a complaint, which culminated into the Mavoko Chief Magistrate's Court Criminal Case No. 934 of 2012. It averred that in the said Criminal Case, the 1st to 4th Defendants who were the accused persons denied trespassing on the suit land. Further, that in the judgement, the Court found that LR 20869 I.R 67100 (suit land) belonged to it.

Evidence of the Defendants

5. The Defendants claimed that they had been on the suit land since 1994 having been permitted to occupy it, as a squatters. Further, that they had lived on the suit land for over 19 years together with others and got their children thereon, without interruption from either the government or private body. They contended that they had acquired the suit land through adverse possession. They insisted that the suit land appears as a public utility plot at the Ministry of Lands and Physical Planning. They contended that the Plaintiff had a false title and had never visited the suit land to know where the beacons are. They further claimed that in 1994-1995, the President of Kenya directed the Local Mayor



to settle the squatters on the suit land. Further, that the Mayor and officials of the County Council had a meeting wherein the Mayor agreed that the squatters were to be moved and given public utility land, which is equivalent to 182 acres. He explained that, they did not have allotments to show that the suit land belonged to them, save for a document written by the Mayor. The Defendants confirmed that they were sued in Mavoko CMC Criminal Case No. 934 of 2012 and that in the matter. DW1 Amos Kilonzo stated that he does not reside on the suit land.

6. DW2 Jonathan Mutisya who was an official of Mlolongo East Settlement Scheme (MESS) testified that the said scheme applied to the Mavoko Municipality for allocation of public land in 2009. Further, that on 24th September 2009, the then Mayor allowed the schemes' members to occupy the suit land, which is a public utility land as squatters and when they entered the said land, they found other squatters who had occupied a portion of it and had constructed shelters thereon. When cross-examined, DW2 confirmed that they applied to be allocated the suit land on 24th September 2009 from the Mayor of Mavoko Municipality and that at the time of applying, they were told that it was public utility land. DW2 explained that the part of the suit land, where the Mayor allowed them to occupy, is not mentioned in the letter dated 24th September, 2009.

Submissions

7. The Plaintiff in its submissions provided a summary of facts of the dispute herein and argued that by producing a copy of the Certificate of Title for the suit land, which was not controverted, in accordance with the provisions of Section 26 of the *Land Registration Act*, it had established that it is the legal registered owner of the suit land. To support this argument, it relied on the case of *Wreck Motor Enterprises v Commissioner of Lands & 3 Others* [1997] eKLR.
8. It further submitted that Article 62 (3) of *the Constitution* gives the National Land Commission the mandate to administer public land and that Section 9 (1) and 12 (1) of the *Land Act* 2012 allows for conversion of public land into private land. To this end, it argued that it leased the suit land for public purpose.
9. It insisted that, it adhered to the due process in acquiring the suit land and acknowledged that a Letter of Allotment alone is not conclusive evidence for one to assert property rights. To this end, it relied on the case of *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) OF 2022 [2023] KESC 79 (KLR). It reiterated that the Defendants' actions of illegally occupying the suit land, erecting temporary structures thereon and destroying beacons contributed to financial loss to it and amounted to trespass, hence it was entitled to mesne profits. To buttress its averments, it relied on the case of *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR.
10. The Defendants in their submissions contended that the conversion of the suit land from public utility was unprocedural and influenced by political power. They argued that the Plaintiff failed to demonstrate the root of its Certificate of Title to prove ownership and the said title is hence amenable to challenge by dint of Section 26 (a) and (b) of the *Land Registration Act*. To support their arguments, they relied on the case of *Dina Management Limited v County Government of Mombasa & 5 Others* [2023] eKLR. They insisted that since the Plaintiff did not prove that, it is in possession of the suit land, they cannot be deemed to have trespassed thereon. Further, that they represent an association with more than one thousand (1,000) members and no evidence has singled them to have trespassed on the suit land.



Analysis and Determination

11. Upon consideration of the Plaintiff, Statement of Defence including counterclaim, testimonies of the witnesses, exhibits and rivalling submissions, the following are the issues for determination: Whether the Plaintiff owns LR No. 20869 IR 67600. Whether the Defendants are trespassers on the suit land. Whether the Plaintiff is entitled to the orders sought in the Plaintiff. Whether the Defendants are entitled to the orders sought in the Counterclaim.

As to whether the Plaintiff owns LR No. 20869 IR 67600.

12. The Plaintiff claims that it was issued with a title to LR No. 20869, IR 67600, which title is challenged by the Defendants, who claim the suit land is public utility. PW1 Adow Yusuf Mohammed who is one of the trustees of the Plaintiff explained that they had applied from the government of Kenya, to be allocated the suit land, paid the requisite fees including premiums, hired services of a surveyor, were granted a Letter of Allotment and later their Certificate of Title was processed. The Defendants insist they have been on the suit land, having been allowed to occupy the same by the then Mayor of Mavoko. DW1 confirmed he did not reside on the suit land but there were other people thereon. DW2 who claimed to be an official of Mlolongo East Settlement Scheme also claimed that the suit land is public utility which they were allowed to occupy. Further, that their members are thereon. I have perused documents produced by both parties and I note the Plaintiff was issued with a Deed Plan dated the 25th May, 1995, Letter of Allotment dated 16th November, 1995 for UNS. Site 'A' for Educational & Orphanage Centre – Athi River and Title Deed for LR No. 20869 IR 67600 dated 23rd November, 1995. I note the Plaintiff also produced Search from the Ministry of Lands, Rate Clearance Certificate, Receipts for Rate payment, Letter dated 1st October, 2012 and 19th July, 2012 respectively from the Municipal Council of Mavoko, granting it authority to erect temporary fence as exhibits. The Defendants on the other hand produced a List of the Squatters as at 2005, Copy of Letter from the Municipal Council of Mavoko to confirm suit land is public utility, Copy of the Letter from Ministry of Land for Approval for issuance of allotment letter to the Squatters, Allotment Letter dated 4th October, 1997 for UNS Residential Land Plot A, Athi River, and receipt for payment to Ministry of Lands for Standard Premiums dated 7th November, 1997. The Defendants have claimed they are on the suit land, have acquired it through adverse possession and that the Plaintiff's title was obtained unprocedurally.
13. On proof of proprietorship, section 26 (1) of the [Land Registration Act](#) provides inter alia:
- “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.”
14. While Section 24 (a) of the [Land Registration Act](#) stipulates as follows:
- “Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....”



15. In the case of Dr. Joseph Arap Ngok – Vs – Justice Moiyo Ole Keiwua & 5 Others, Nai. Civil Appeal No. 60 of 1997 the court categorically declared that:-

“Section 23 (1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the [Land Registration Act](#)) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

16. While in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal 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.”

17. Based on the pleadings together with the evidence presented before Court, while relying on the legal provisions cited as well as associating myself with the quoted decisions, in my view the Plaintiff has actually explained the root of its title through obtaining the Deed Plan, Letter of Allotment, Certificate of Title and payment of various dues/premiums as indicated in the receipts. The Defendants claim the Plaintiff’s title is fake, but I opine that the burden of proof was upon them, to produce evidence from the Land Registry to prove the averment, but they have failed to do so. I note the Defendants have produced certain documents including Letter of Allotment, which I note was issued after the Plaintiff’s Letter of Allotment. Further, they did not tender any evidence to demonstrate that the allotment letter issued to the Plaintiff was cancelled as required by law. In the circumstances, I find that the Plaintiff holds a valid title to the suit land and will uphold it.

As to whether the Defendants have trespassed on the suit land.

18. The Plaintiff claims the Defendants have trespassed on the suit land. DW1 admitted that they were arrested and charged for forceful detainer but acquitted. It was PW1’s contention that the Defendants were acquitted because they denied being on the suit land.
19. On the issue of trespass, I will refer to the definition of the same as contained in Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01 where it states thus:

“As any intrusion by a person on the land in the possession of another without any justifiable cause”.

20. While Section 3 of the [Trespass Act](#) provides that,

“(1) 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. (2) Where any person is charged with an offence under subsection



(1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”

21. In the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR, the Court of Appeal favourably cited the case of *M’Mukanya v M’Mbiyiwe* (1984) KLR 761 and stated inter alia:

“Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*, (1953) 2QB 153.”

22. From the evidence before this court, including associating myself with the decisions cited, since I have made a finding that the Plaintiff is the proprietor of the suit land, noting that the Defendants had denied being on the suit land in the aforementioned Mavoko CMC Criminal Case No. 934 of 292 but now admit some of them are on the suit land, I find that the Defendants have indeed trespassed thereon.

23. The Plaintiff has claimed damages for trespass and mesne profits. On award for damages of trespass and mesne profits, in the case of *Duncan Nderitu Ndegwa v. KP& LC Limited & Another* (2013) eKLR, P. Nyamweya J (as she then was) held that:-

“As regards the award of mesne profits, these are special damages which not only need to be pleaded but also proved. The Plaintiff did not bring any proof of the basis for the mesne profits of Kshs.50,000/= per month, but brought evidence to show that the land was in a state that was unusable, and it therefore could not provide any sort of profits.....once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants’ trespass”

24. In the foregoing, I will proceed to award the Plaintiff Kshs. 200,000/= as damages for trespass.

25. However, for the Plaintiff’s claim for mesne profits, I find that it has failed to prove it, to the required standard and will decline to award it.

As to whether the Defendants are entitled to the orders as sought in the Counterclaim.

26. The Defendants have sought for various orders in the counterclaim including a claim over the suit land through adverse possession. I note during the hearing the Defense witnesses labored to convince the court that the suit land is public utility land, which they had occupied adversely. DW2 in his testimony contended that the Defendants had applied for the suit land in 2009. While DW1 in his testimony claimed that the Defendants entered the suit land in 1994 following President Daniel Arap Moi’s direction that they be allowed to occupy the parcel as squatters by the then Mayor of Mavoko County Council.

27. DW2’s claim that they were permitted to occupy the suit land by the Mayor of Municipal Council of Mavoko vide a letter dated 24th September, 2009, is misleading as the said letter does not make reference to the suit land nor to Mlolongo East Solutions Self Help Group. Further, DW2’s evidence that the Defendants applied for the suit land in 2009 contradicted DW1’s evidence that the Defendants entered the suit land in 1994, following President Daniel Arap Moi’s direction that they be allowed to occupy the said parcel as squatters.



28. In the case of Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] KECA 248 (KLR), the Court of Appeal stated that:

“...There cannot be a claim of adverse possession against public land.”

29. In the foregoing, while relying on the aforementioned decision, I find that the Defendants claim of adverse possession over the suit land, contending it is public land cannot stand.

30. Further, this Court takes judicial notice of the fact that in the proceedings in Mavoko Chief Magistrates Court Criminal Case No. 934 of 2012, which was produced as an exhibit, one witness Joseph Kamuyu PW12 who was a Land Registrar, confirmed that as per their records, LR No. 20869 IR 67600 which is the suit land herein, belonged to the Plaintiff. Further, the 3rd Defendant herein, who was the first accused person denied knowledge of LR No. 20869 (suit land) nor occupying the said land. He confirmed that he was residing in Mlolongo and had no interest in the suit land. Further, that he was not a member of Mlolongo Self Help Group. The 2nd Defendant who was the 4th accused Person also denied invading the suit land. Further, that he was not a member of Mlolongo Self Help Group. The accused persons were hence acquitted of the offence of forceful detainer, since the trial court found they were not on the suit land. This evidence tendered before the criminal court contradicts the Defendants claim that they have been on the suit land from 1994.

31. In the foregoing, I find that the Defendants have not proved their claim as per the counterclaim and will proceed to dismiss it with costs.

32. In the circumstances, I find that the Plaintiff has proved its case on a balance of probability and will proceed to enter judgement in its favour in the following terms:

- a. A permanent injunction be and is hereby issued restraining the defendants from remaining on, trespassing upon, wasting, constructing, selling, alienating, fencing off, interfering and/or dealing in any manner whatsoever with land reference No. 20869.
- b. The defendants are hereby directed to remove any structures on LR No. 20869 at their cost.
- c. Kshs. 200,000/= is awarded as general damages for trespass.
- d. Costs of this Suit and Counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20th DAY OF FEBRUARY 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ms Wambui Gichuru holding brief for Ogle for Plaintiffs

Mutinde for Defendants

Court Assistant: Joan

