



REPUBLIC OF KENYA



**KENYA LAW**  
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**Teskin & 4 others v Makokha & 2 others (Environment & Land Case E006 of 2022) [2025] KEELC 951 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 951 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E006 OF 2022  
EC CHERONO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**JACKSON NYAMWEYA TESKIN ..... 1<sup>ST</sup> PLAINTIFF  
JAMIN PSISEI ENOS ..... 2<sup>ND</sup> PLAINTIFF  
CHEROBEN PETER ENOS ..... 3<sup>RD</sup> PLAINTIFF  
NICK KWEMBOI ..... 4<sup>TH</sup> PLAINTIFF  
DENNIS KIBET ALIAS NYEUSI ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**CHARLES MUYALA MAKOKHA ..... 1<sup>ST</sup> DEFENDANT  
BEN NGOTUNY CHESEBE ..... 2<sup>ND</sup> DEFENDANT  
GIDEON K KAPCHANGA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated the 26/03/2022, the Plaintiffs pray for judgement against the Defendants for:
  - a. Declaration that the defendants hold in trust for the plaintiffs and the plaintiffs' families, the entire parcels of land known as North Malakasi/East Sasuri/795,796,797 and 798 respectively and an order of eviction do issue against the defendants from the parcels.
  - b. Costs
  - c. Interest
  - d. Any other relief that the Hon. Court may deem fit to grant.



2. It is the plaintiffs' case that they are the sons of Enos Motwoi Wateya who was the son of the late Teskin Wateya brother of the late Kimwatoyo Weteya all sons of Kipkates Weteya. The said Kimwatoyo Weteya is said to have been the registered owner of Land parcel no. N.Malakasi/E.Sasuri/61 which was given to him by his father who is also the plaintiffs grandfather. That Kimwatoyo Weteya did not have sons and he therefore requested his nephew Enos Motwoi Wateya to stay with him and that at the time of Kimwatoyo Weteya's death, Enos Motwoi Wateya, his father and their families lived on the said land thus the land is ancestral land.
3. That the defendants herein in collusion with one Nelson Buchunju Saundi secretly and fraudulently petitioned for letters of administration for the estate of Kimwatoyo Weteya after which they caused a sub-division of the same giving rise to the following resultant parcels namely L.R NO. N.Malakasi/E.Sasuri/795,796,797 and 798(herein after referred to as 'the suit properties') registered in the names of Charles Munyala Makokha (1<sup>st</sup> plaintiff), Ben Mgotuny Chesebe(2<sup>nd</sup> Defendant), Charles Munyala Makokha(1<sup>st</sup> Plaintiff) and Gideon K. Kapchanga(3<sup>rd</sup> Defendant) respectively. They went on and set out particulars of fraud against the defendants.
4. The Defendants entered appearance and filed a joint statement of defence dated 12/05/2022 where they denied the plaintiffs' claim and admitted the descriptive part and the courts jurisdiction. They argued that they are not aware of any relationship of the plaintiffs and the antecedents as particularized in the plaint. That the estate of Mutwoi Wateya was succeeded in the year 1984 by Jonathan Teskin Ateya in Bungoma SRM Succ Cause No.42 of 1984 where he was confirmed as the sole beneficiary of Land parcel no. as N.Malakasi/E.Sasuri/61.
5. That the said beneficiary died before sub-dividing the land which process was taken over by Nelson Buchunju Sandui who distributed the land to the defendants who were purchasers in Bungoma Succ. Cause No. 195 of 1999 which succession cause has never been challenged to date. They sought to have the plaintiffs case dismissed with costs.
6. By way of a response, the plaintiffs filed a reply to defence dated 02/06/2022.
7. The 2<sup>nd</sup> defendant who passed away mid-trial was substituted with one Chepkurkat Alice Chesebe who filed a statement of defence and counter-claim dated 25.10.2022. In her defence, she averred that the land was legally sold to Ben Mgotuny Chesebe and that the threshold for establishing the existence of a trust had not been achieved. She stated that the plaintiffs' suit was also irredeemably time barred. In the counter-claim, she averred that Ben Mgotuny Chesebe purchased land known as N.Malakasi/E.Sasuri/796 from the 1<sup>st</sup> plaintiff vide an agreement dated 6.4.1984 and took possession immediately. His purchasers' rights were confirmed in the succession cause. That the plaintiffs invaded part of all that land known as N.Malakasi/E.Sasuri/796 and erected illegal structures causing her untold losses. She therefore sought for the following orders against the plaintiffs;
  - a. A declaration that the plaintiffs are trespassers to the suit land known as N.Malakasi/E.Sasuri/796
  - b. An order of eviction of the plaintiffs from the suit land known as N.Malakasi/E.Sasuri/796
  - c. A permanent injunction restraining the plaintiffs, their agents, servants, assignees or any other person acting through them from encroaching and/or claiming ownership of land comprised in the suit land known as N.Malakasi/E.Sasuri/796.
  - d. Mesne profits accruing since February 2022
  - e. General Damages



- f. Costs of the suit.
8. The 4<sup>th</sup> and 5<sup>th</sup> plaintiffs filed a statement of defence and defence to counter-claim with regards the 2<sup>nd</sup> defendants counter-claim dated 09/01/2023 where they denied the facts as averred and added that the said claim offends the provisions of section 4(7) of the *Limitation of Actions Act*.

### **Evidence By Parties.**

9. After pre-trial conference, the matter was set down for hearing where the plaintiffs called six (6) witnesses while the defendants called three (3) witnesses.

### **Plaintiffs Case**

10. PW1 Jackson Nyamweya Teskin adopted his witness statements dated 26/03/2022 and 09/05/2023 as his testimony-in-chief. He produced in evidence documents contained in his list of documents dated 12/03/2022. The documents are 12 in total and produced as P-Exhibit 1-12 respectively. He stated that he lives in ½ acre of the suit properties. In cross-examination, he denied selling the land and stated that the 2<sup>nd</sup> defendant occupied the land forcefully using his authority as chief and that after his death, none of his family is using the land.
11. PW2 Jamin Psisei Enos adopted his witness statement dated 29/03/2022 and 09/05/2023 as his testimony-in-chief. On cross-examination, he stated that the confirmation of grant for the estate of Motwoi Wetea taken out by Jonathan Teskin Wetea was fraudulent since he was not a member of that family and that they did not challenge it. He stated that he lives in the suit properties and has developed the same.
12. PW3 Cheroben Peter Enos adopted his witness statements dated 26/3/2022 and 09/05/2023 as his testimony-in-chief. When cross-examined by the court, he stated that land parcel no. N.Malakasi/E.Sasrui/61 which measured about 21.5 acres was registered in the name of Mwotoi Wateya who was his grandfather. He stated that together with his siblings and family, they have been pushed to only ½ acre.
13. PW4 Nick Kwemboi Mutwo adopted his witness statement dated 09/05/2023 as his testimony-in-chief and denied the 2<sup>nd</sup> defendants counter-claim stating that he lives on the suit properties and that he once reported an undisclosed incident to the police.
14. PW5 Dennis Kibet Psisei adopted his witness statement dated 09/05/2023 as his testimony-in-chief. He testified that he has the original certificate of title in the name of his grandfather Kimwatayo Wateya. He stated that he is unaware of any sale agreements that might have been entered into. He testified that he was born in the suit land and has lived there since.
15. PW6 Kristopha Kimugame Chesebe also adopted his witness statement dated 09/05/2023 as his testimony-in-chief. He stated that his family has been pushed to occupy ½ acre.

### **Defendants' Case**

16. DW1 Charles Munyala Makhoka adopted his witness statement dated 12/05/2022 as his testimony-in-chief. He also referred to the list of documents dated 30/05/2023 containing 13 items which he produced as D-Exhibit 1,3,4,5,7,9,10,11,12 & 13 respectively. He testified that he bought land parcel no. N.Malakasi/E.Sasrui/61 and that he did not conduct a search prior. That stated that he bought one portion from one Jonathan Teskin Wateya in 1986. That in the succession cause no.195 of 1999, he was allocated 5 acres. It was his evidence that there was nobody on the suit land. That the plaintiffs came to the land after the tribal clashes in the year 2000.



17. DW2 Alice Chepkurgat Chesebe adopted her witness statement dated 25/10/2022 as her testimony-in-chief and produced six (6) items contained in her list of documents of even date which contained 6 items as D-exhibit 1-6 respectively. She also produced a certificate of search for land parcel no. N.Malakasi/E.Sasrui/796 as D-Exhibit 7. In cross-examination, she stated that her father (the 2<sup>nd</sup> defendant, purchased the abovementioned land from one Jackson Nmwenya Teskin on 06/04/1984 and his interest in the land were as was confirmed in the certificate of grant for the estate of Motwoi Watwya where he was given 3 acres.
18. DW3 Gideon Kipchemut Kapchanga adopted his witness statement dated 12/05/2002 as his testimony-in-chief. He equally produced into evidence documents contained in his list of documents of even date containing 8 items as D-Exhibits 1, 2, 3, 4, 5, 6, 7 and 8 respectively. He also produced a sale agreement dated 06/02/1982 and a title deed for land parcel no. N.Malakasi/E.Sasrui/798.

### Submissions By Parties

19. At the close of their respective cases, the parties agreed to file written submissions within agreed timelines.
20. The plaintiffs filed their written submissions dated 08/11/2024 where they submitted on three issues. The first issue discussed was, Whether the plaintiffs have proved their case to the required standard. It was submitted that the defendants succeeded the estate of Motwoi Wetwya as his heirs thus they are from the same family as the defendants i.e Motwoi Wetwya thus the plaintiffs and that a customary trust has been sufficiently proven. They relied on the case of Kiebia v. M' *Lintari & Another (Civil Case 10 of 2015)* [2018] KESC 22 (KLR) (5 October 2018) (Judgment), Meru HCC No. 146 of 2000 Peter Gitonga v. Francis Main M'ikiara.

Whether the 2<sup>nd</sup> defendant has proved her counter-claim against the plaintiff. It was submitted that the plaintiffs testified that they all live and work with their families on the suit parcels of land and that it was not true that they came into the land in the year 2022.

The third issue was on costs and they argued that having proved their claim, they ought to be awarded costs of the suit and the counter-claim.

21. The defendants filed submissions dated 17/01/2025 where they submitted on three issues. the first issue was whether a title obtained by way of a grant can be defeated without first revoking the grant. the defendants answered this in the negative and relied on the case of John Ongudi Oyoo Vs. Japheth Ogolo Oyoo (2017) eKLR.
22. On the second issue whether a purchaser's interest can result into a trust, the defendants argued that they were purchasers and not clan members with the plaintiffs and as such, the suit was untenable. they cited the case of Mbaluto V Kasalu(Succession Cause 744 of 2015) [2022] KEHC 12778 (KLR).
23. The third issue was whether the defendants remain to be the indefeasible owners of all the suit land. they relied on the provisions of section 24(a) and 26(1) of the *land registration act* and argued that they hold the tiles to the suit properties legally, having acquired them procedurally. they relied in the case of Kamoye V. Tipango & 2 Others (ELC E011 of 2023) [2024] KEELC 4227(KLR) 14<sup>th</sup> May 2024 Judgment.



## Legal Analysis And Determination

24. I have carefully considered the pleadings by the parties, the evidence adduced, the rivals written submissions, authorities cited and the relevant provisions of law and identify the following as issues for determination;
- i. Whether the Plaintiffs have made a case for existence of a trust over the suit land.
  - ii. Whether the 2<sup>nd</sup> defendant made a case for his counter-claim.
  - iii. Who bears the costs.
25. On whether a customary trust has established over the suit land, the Plaintiffs contend that the suit land parcel No. N.Malakasi/E.Sasuri/61 was originally registered in the name of Kimwatayo Wateya alias Motwoi Wateya who was their uncle and grandfather and they produced a certificate of official search, a land certificate and a green cards P-Exhibit 5, 8 and 10 which show that he was registered as the first owner on 08/03/1965. That the defendants in collusion with one Nelson Buchunju Sandui petitioned for letters of administration of Kimwatayo Wateya alias Motwoi Wateya as per P-Exhibit 7 & 9 who died 22/03/1997 as shown in the certificate of death produced as P-Exhibit 6; causing it to be sub-divided into the resultant suit properties whose titles were produced as P-Exhibit 1,2,3 & 4. They argued that they have been pushed to occupy a ½ acres of the suit properties and produced photographs in support of this claim as P-Exhibit 12,13 (a), (b) & (c).
26. The defendants on the other hand claim to be purchasers of the suit properties and produced agreements dated 06/02/1982, 10/01/1986 and 06/04/1984 as D-Exhibit 1 & 2 and D2-Exhibit no.2. The 1<sup>st</sup> defendant claims to have purchased his share from Jonathan Teskin Wateya while the 2<sup>nd</sup> defendant claims to have bought his share from Jackson Namwenya Teskin (the 1<sup>st</sup> plaintiff herein) and the 3<sup>rd</sup> defendant claims to have bought his share from Jonathan Teskin Wateya.
27. They stated they acquired their titles through transmission after Jonathan Teskin Wateya filed a succession cause in respect of the estate of Mwotoi Wateya in Bungoma SRM Succ. Cause No. 42 of 1984(D-Exhibit 3). That he (Jonathan Teskin Wateya) died before he could sub-divide the land and that one Nelson Buchunju Sandui took up the role of sub-division after taking out letters of administration in Bungoma HC Succ. Cause No. 195 of 1999 (D-Exhibit 4). They produced their respective title deeds as D-Exhibit 5,6,7 & 8. They also produced an injunction order, an eviction order, decree and notice to vacate issued in Bungoma HC Civil Suit no. 89 of 2000 against Jamin Psesei Enos (2<sup>nd</sup> plaintiff), Enos Teskin Oteya and Chepkat Enos as D-Exhibit no.9,10,11 & 12.
28. The single issue conceded by both parties is that Kimatwayo Wetaya was the initial registered owner of land parcel no. N.Malakasi/E.Sasuri/61.
29. The rights of a registered owner of property were clearly set out under Sections 27 of the Registered Land Act Cap 300(now repealed) which have now been mirrored in Section 24 of the Land Registration Act 2012 as follows; -

“24. Subject to this Act

- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”



30. Section 25(1) LRA NO.3 of 2012 which mirrors Section 28 of the RLA (repealed) provides that the rights of a registered are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided for under the Act. The rights of a registered owner are however subject to overriding interests declared under Section 28 of the LRA, NO.3 of 2012 as not required to be noted in the register. The above section is similar to Section 30 of RLA (repealed) which provides as follows:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—(a)..... (b)trusts including customary trusts;”

31. The concept of a customary trust was well discussed by the Supreme Court in the case of Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another [2018] eKLR where it held as follows:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

- i. The land in question was before registration, family, clan or group land.
- ii. The claimant belongs to such family, clan, or group.
- iii. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
- iv. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
- v. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

32. The Plaintiffs’ claim in the suit land is based on customary trust and fraud as pleaded in the plaint. The defendants’ case is that they are the absolute registered owners of the suit properties and their rights were confirmed in the letters of administration issued on 29/12/1999. From the above arguments, it is trite that registration of a person as a proprietor of land does not relieve him of his duty as a trustee. A customary trust is a non -registrable right(s) which runs with the land and is considered to be an encumbrance on land. See the case of Kanyi vs. Muthoria (1984) KLR 712.

33. In proving a customary trust, the legal burden of proof rests with the one who is asserting a right under customary trust pursuant to Section 107(1) of the *Evidence Act*. The elements to be established in a claim for customary trust were as set out in Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another(supra).

34. In the case of Njenga Chogera vs. Maria Wanjira Kimani & 2 Others (2005) eKLR which cited with approval in the holding in the case of Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42, the Court of Appeal held that customary trust is proved by leading evidence. Trust is a question of fact, which must be proved by whoever is claiming a right under customary trust. A trust can never be implied by the



Court, unless there was intention to create a trust in the first place. In the case of Peter Ndungu Njenga vs. Sophia Watiri Ndungu (2000) eKLR, the Court held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

35. In the case of *Ngugi v Kamau & another* (Environment & Land Case 36 of 2020) [2022] KEELC 2261 (KLR) (23 June 2022) (Judgment) L.Gacheru J stated that;

“Going by the decision of the Supreme Court referred to herein above, it follows that evidence must be led that points to the root of the land. Pertinent question that must concern this Court are such as; how was the land first registered? Was it clan, communal or family land before registration? Was the land inherited or passed down from the family lineage? How did the 1<sup>st</sup> Defendant acquire this land? Did he inherit or he acquired by way of purchase or a gift?”

36. In the instant suit, it emerges from the evidence that the original land i.e N. Malakasi/E.Sasuri/61 was passed down to Kimwatayo Wateya by his father Kipkates Wateya to hold for himself. The said Kimwatayo Wateya was a brother to Teskin Wateya who is the grandfather of the plaintiffs and who was given land elsewhere i.e. in Chepkube. The plaintiffs claim therefore would ideally lie in the estate of their parents or grandfather Teskin Wateya. From the evidence, the said Kimwatayo Wateya did not have children and upon his demise, his brothers' children took over his land. From my evaluation and analysis of the evidence, it is clear that the land in issue was intended to be family land having devolved from father to son therefore inter-generational. I refer to the case of *Mbui Mukangu v Gerald Mutwiri Mbui*(2004)eKLR, where it was held that in inferring a customary trust, the fact that the subject land was ancestral land that devolved to the Defendant from his late father was a clear testament of existence of a customary trust and that this kind of trust serves intergenerational equity where the land is held by one generation for the benefit of succeeding generations.

37. This therefore begs the question how the defendants obtained title of the suit properties. The defendants presented sale agreements in support of the argument that they purchased the properties from various members of the family of Kimwatayo Wateya as stated elsewhere in this judgment. The said agreements are dated 06/02/1982, 10/01/1986 and 06/04/1984 and produced as D-Exhibit 1 & 2 and D2-Exhibit no.2. Notably, the plaintiffs did not contest the said agreements, not even the 1<sup>st</sup> plaintiff who is said to have sold 3 acres to the 2<sup>nd</sup> defendant.

38. I considered the said agreements against the law on validity of agreements on disposal of land. The repealed Section 3 of the [Law of Contract Act](#), Cap 23 Laws of Kenya provided as follows:-

“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 authorized by him to sign it.



39. In my view, the agreements meets the criteria for a valid sale agreement in the absence of proof of any vitiating factors. See the case of Nelson Kivuvani vs Yuda Komora & Ano. Nairobi HCCC No. 956 of 1991, where the court- held: -

“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligation express or implied of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract.”

40. Further, the defendant’s produced an injunction order, an eviction order, decree and notice to vacate issued in Bungoma HC Civil Case No. 89 of 2000 which was instituted by the 1<sup>st</sup> defendant against Jamin Psesei Enos (2<sup>nd</sup> plaintiff), Enos Teskin Oteya and Chepkat Enos. This court is inclined to believe the evidence of the defendants that indeed they purchased the suit properties as asserted and obtained their respective titles. The said family land having been sold by the plaintiffs’ parents, therefore ceased being ancestral land.

41. Further, knowing that the defendants obtained their title as a result of transmission, it is not clear why the plaintiffs never sought to have the grant which they claim was fraudulently issued by collusion of the defendants and the said Nelson Buchunju Sandui revoked in accordance with Section 76 of the Law of Succession Act. I agree with defendants that they ought to have sought to revoke the grant before coming to this court. By seeking to have the suit properties declared customary land and revert to them is akin to asking this court to sit in appeal on the succession court’s decision which is untenable in law.

42. On the other hand, the 2<sup>nd</sup> defendants filed a counter-claim and sought for a declaration that the plaintiffs are trespassers on land known as N.Malakasi/E.Sasuri/796, for an eviction order and a permanent injunction against them, mesne profits and general damages. As discussed in preceding paragraphs, I have found that the plaintiffs have failed to prove their case, there being no evidence vitiating the sale agreements presented and any evidence that the resultant titles were procured unlawfully. From the facts before me and while relying on Section 24, 25(1) and 26 of the Land Registration Act, I find that since the 2<sup>nd</sup> defendant has produced a certificate of title as proof of ownership of the claimed portion of land which title have not been successfully challenged by the plaintiffs, he is indeed the absolute proprietor of the said suit lands, hence entitled to all rights and privileges belonging or appurtenant thereto and to protection of the law

43. According to Black’s Law Dictionary 8<sup>th</sup> Edition, Trespass is defined, in the strictest sense, as;

“An entry on another’s ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property”

44. The 2<sup>nd</sup> defendant claimed that the plaintiffs are in occupation of his land and sought to have them declared as trespassers and evicted therefrom. The plaintiffs during their testimony confirmed that they attended court having come from the suit properties. Having found that the 2<sup>nd</sup> defendant is the legal owner of N.Malakasi/E.Sasuri/796, the plaintiffs therefore have no business being in the said land without the consent and or authority of the 2<sup>nd</sup> defendant. I therefore find that they are trespassers.

45. On whether this court should issue an order for eviction, I am guided by the provisions of Section 152E of the Land Act on service of eviction notices, which provides that:-

“(1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the



owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.

- (2) The notice under subsection (1) shall –
- (a) be in writing and in a national and official language;
  - (b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
  - (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
  - (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.”

46. There is no evidence that the 2<sup>nd</sup> defendant served the plaintiffs with notices to vacate from the suit property. Having found that the plaintiffs are trespassers on the suit properties, I shall exercise this court’s discretion and inherent powers to grant a ninety (90) days period within which the plaintiffs should vacate the 2<sup>nd</sup> defendants land (for avoidance of doubt land parcel no. N.Malakasi/ E.Sasuri/796). Further and in line with the principles established in the celebrated case of Giella Vs Cassman Brown & Company Limited (1973) EA 358, I find that the plaintiffs including heir agents should be permanently restrained from their acts of trespass on land parcel no. N.Malakasi/ E.Sasuri/796.

47. The 2<sup>nd</sup> defendant has sought for mesne profits as against the plaintiffs for having encroached on his land. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya 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;’

48. I note that other than pleading for mesne profits, the 2<sup>nd</sup> defendant did not furnish this court with any evidence on the extent of encroachment and the loss he had suffered. In the case of Peter Mwangi Mbutia & another v Samow Edin Osman [2014] eKLR, the Court of Appeal while dealing with a similar issue of mesne profits 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.”

49. Based on the evidence placed before me, I find that the 2<sup>nd</sup> defendant failed to discharge his burden of proof that he is indeed entitled to a claim for mesne profits and I will decline to award him the same.



50. The 2<sup>nd</sup> defendant also sought for damages against the plaintiffs. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of Park Towers Ltd v. John Mithamo Njika & 7 others (2014) eKLR where J.M Mutungi J., stated:-

“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 damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case...

51. Considering the peculiar circumstances of this case where the 2<sup>nd</sup> defendant, despite stating that the plaintiffs entered into his land in February 2022 and he has never issued them with notices to vacate, I will award minimal damages.

52. On costs section 27 of the *Civil Procedure Act* provides that costs of any action, cause or other matter, or issue follow the event.

53. In the upshot, I enter judgment for the 2<sup>nd</sup> defendant and make the following final orders:

- a. The plaintiffs’ case against the defendants is hereby dismissed.
- b. A declaration is hereby issued that the plaintiffs are trespasser on the 2<sup>nd</sup> defendants parcel of land known as L.R No. N.Malakasi/E.Sasuri/796.
- c. The plaintiffs shall vacate L.R No. N.Malakasi/E.Sasuri/796 within 6 months from the date hereof failure which they 2<sup>nd</sup> defendant may apply for an eviction order.
- d. A permanent injunction is hereby issued restraining the plaintiffs, their agents, servants, assignees or any other person acting through them from encroaching land known as N.Malakasi/E.Sasuri/796.
- e. The plaintiffs to pay the 2<sup>nd</sup> Defendant General damages in the sum of twenty thousand (Kshs.20,000).
- f. The plaintiffs shall bear the costs of the suit and the 2<sup>nd</sup> defendants counter-claim.

54. It is so ordered.

**DATED SIGNED AND DELIVERED AT BUNGOMA THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....  
**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. M/S Maskhalia H/B for Bwonchiri for the plaintiffs.
2. Mr. Alovi for the defendants
3. Bett C/A.

